Docket for 02-819

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No. 02-819 Status: ARGUED
Title: Andrew J. Kontrick, Petitioner
v.
Robert A. Ryan
Docketed: November 29, 2002
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (01-2683)
Decision Date: July 8, 2002
Rehearing Denied: August 27, 2002

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 25 2002	Petition for writ of certiorari filed. (Response due December 30, 2002)
Jan 21 2003	Response Requested . (Due February 20, 2003)
Feb 13 2003	Order extending time to file response to petition to and including March 24, 2003.
Mar 24 2003	Response to petition from respondent Robert A. Ryan filed.
Apr 7 2003	Reply of petitioner Andrew J. Kontrick filed.
Apr 28 2003	Petition GRANTED.
Jun 12 2003	Brief of petitioner Andrew J. Kontrick filed.
Jun 12 2003	Joint appendix filed.
Jun 12 2003	Brief amicus curiae of National Association of Consumer Bankruptcy Attorneys filed.
Jul 17 2003	Brief amicus curiae of United States filed.
Jul 17 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 17 2003	Brief of respondent Robert A. Ryan filed.
Aug 19 2003	CIRCULATED.
Aug 19 2003	SET FOR ARGUMENT Monday, November 3, 2003
Aug 21 2003	Reply of petitioner Andrew J. Kontrick filed. (Distributed)
Aug 25 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Aug 26 2003	Record received from the U.S.D.C. for the Northern District of Illinois. (1 box)
Sep 5 2003	Record received from the U.S. Court of Appeals for the Seventh Circuit. (1 envelope)
Nov 3 2003	Argued. For Petitioner: E. King Poor. For Respondent: James R. Figliulo; and on behalf of the United States, as amicus curiae, Kent L. Jones, Assistant to the Solicitor General, Department of Justice, Washington, DC.

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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

ANDREW J. KONTRICK,

Petitioner,

v.

ROBERT A. RYAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The deadlines for objecting to a debtor's discharge in bankruptcy are set by Bankruptcy Rule 4004. The Fifth, Tenth and Eleventh Circuits and a majority of the district and bankruptcy courts hold that the deadlines for objecting to discharge are jurisdictional and cannot be waived. On the other hand, the Second, Fourth and Seventh Circuits and a minority of district and bankruptcy courts follow the view that such time limits are not jurisdictional and may be waived. Thus, the question presented is whether the deadlines established by the bankruptcy rules for objecting to discharge are jurisdictional.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the court of appeals below holding that the time limits set by Bankruptcy Rule 4004 are not jurisdictional is reported as *Ryan v. Kontrick*, 295 F.3d 724 (7th Cir. 2002). The decision is reprinted in the attached Appendix (App. 1a-23a).

STATEMENT OF JURISDICTION

The court of appeals' judgment was entered on July 8, 2002. Petitioner timely filed a petition for rehearing and for rehearing en banc on July 22, 2002, which was denied on August 27, 2002. App. at 24. This petition is filed within 90 days of that date. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

The district court below had jurisdiction to hear an appeal from the bankruptcy court under 28 U.S.C. § 158(a)(1). The bankruptcy court below had jurisdiction to enter a final judgment in a proceeding arising under Title 11. 28 U.S.C. § 157(b)(1) and (2)(J).

BANKRUPTCY RULE AT ISSUE

The opinion of the court below deals with Bankruptcy Rule 4004. The rule states in relevant part:

> (a) . . . [A] complaint objecting to the debtor's discharge under § 727 of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors . . . .
>
> (b) . . . [T]he court may for cause extend the time to file a complaint objecting to discharge. The motion shall be filed before the time has expired.

STATEMENT OF THE CASE

A. The Bankruptcy Court Followed the Minority Line of Cases That Rule 4004 Is Not Jurisdictional

Petitioner, Andrew Kontrick (Kontrick) filed a bankruptcy petition in April 1997. App. at 1. Based on Bankruptcy Rule 4004, any objection to Kontrick receiving a discharge in bankruptcy had to be filed within 60 days of the first meeting of creditors, unless the bankruptcy court extended that time. In this case, the bankruptcy court extended the deadline to January 13, 1998. App. at 3. On that date, the respondent, Robert Ryan (Ryan), filed a complaint objecting to discharge. *Id.* In particular, Ryan alleged that Kontrick made certain transfers of property within one year of bankruptcy with an intent to defraud and as such should forfeit his discharge under section 727(a)(2) of the Bankruptcy Code. 11 U.S.C. § 727(a)(2).

Almost four months after the deadline for objections to discharge had passed, Ryan filed an amended complaint alleging a new objection to discharge. App. at 4. In the amended complaint, Ryan alleged that Kontrick's deposits of his salary to an account in his wife's name was an additional ground to deny him a discharge ("family account claim"). *Id.* Kontrick filed an answer denying liability, but did not raise that this new claim was filed beyond the Rule 4004 deadline. App. at 4.

The respondent filed a motion for summary judgment. *Id.* This motion contained numerous allegations and what the bankruptcy court described as a "myriad of documents to support the motion, much of which was doomed to failure." *Id.* at 65. The bankruptcy court also found, in response to Kontrick's objections, that many of these allegations were untimely. *Id.* at 47-48. The court then denied the motion on all

grounds, except one—the family account claim that was filed after the deadline. *Id.* at 55; 64. On that ground alone, it granted summary judgment and denied Kontrick's discharge. *Id.*

Kontrick moved to reconsider and pointed out that in opposing the many other allegations as untimely, he had also raised that the family account claim was filed after the deadline. App. at 71. After acknowledging contrary authority, the bankruptcy court held that the Rule 4004 deadline was not jurisdictional, and that Kontrick had not sufficiently preserved an objection to the timeliness of the claim. *Id.* The court also held that the issue could not be raised in a motion for reconsideration and, as a result, deemed it "waived." *Id.* at 31. *Id.* at 72.

B. The District Court and Court of Appeals Also Followed the Minority Rule

Kontrick appealed to the district court and argued that the majority of courts have held that the deadline set by Rule 4004 is jurisdictional and cannot be waived. App. at 29. The district court noted that courts were divided on the issue. *Id.* at 30-31. It then rejected the majority rule and followed a minority line of cases holding that Rule 4004 is not jurisdictional and affirmed the bankruptcy court. App. at 31-32.

On appeal to the Seventh Circuit, petitioner again urged the court to follow the majority line holding that the Rule 4004 time limit is jurisdictional. The Seventh Circuit also rejected the majority rule. App. at 14. At the outset of its opinion, the court acknowledged the split of authority. *Id.* at 7-8. It also noted that the principal case Kontrick relied on was a "thoughtful effort," discussed it at length, but rejected it. *Id.* at 9. The court then sided with the minority line and found that the deadline was not jurisdictional. *Id.*

at 14. The court also rejected Kontrick's argument on the merits and affirmed the district court. *Id.* at 22-23.

REASONS FOR GRANTING THE WRIT

A. There Is a Direct Conflict Among the Circuits as to Whether Rule 4004 Is Jurisdictional

1. The Fifth, Tenth and Eleventh Circuits Hold That Rule 4004 Is Jurisdictional

The discharge a debtor receives in bankruptcy—often referred to as a "fresh start"—is one of the fundamentals of bankruptcy law. To promote a debtor's fresh start, Rule 4004 sets a relatively short time for filing objections to discharge—60 days from the first meeting of creditors or as extended by the court. *See In re Ham*, 174 B.R. 104, 107 (Bankr. S.D. Ill. 1994) (the short period for objecting to discharge is "intended to protect the debtor's fresh start"). Thus, the rules governing objections to discharge play a key role in the proper functioning of the bankruptcy system. And the importance of a *uniform* system of bankruptcy laws is as old as the Constitution. *See* U.S. Constitution, art. I, § 8, [4] ("Congress shall have Power ... to establish ... Uniform Laws on the subject of Bankruptcies throughout the United States").

In this case, the court below made a passing comment that there is "unanimity" among the other circuits that the deadlines for objecting to discharge are not jurisdictional. App. at 7. That comment is not correct. In fact, the recent decision in *In re Rowland*, 275 B.R. 209 (Bankr. E.D. Pa. 2002) shows in detail why the circuits are anything but "unanimous."

In *Rowland*, the court thoroughly examined the current state of the law as to whether these deadlines are jurisdictional. In doing so, the court considered the virtually identical Bankruptcy Rule 4007 governing ob-

jections to the discharge of a particular debt,[1] and then specifically identified the Fifth, Tenth and Eleventh Circuits as adhering to the jurisdictional view:

> Finally, there is a third line of cases which holds that Rule 4007(c) is jurisdictional. *See First National Bank in Okeenee v. Barnes*, 956 F.2d 277 (Table, Text in Westlaw), unpublished disposition, 1992 WL 33251 *1 (10th Cir. 1992) (finding Rule 4007(c) to be jurisdictional); *Neely v. Murchisen*, 815 F.2d 345, 347 (5th Cir. 1987) (finding that Rule 4007 sets a fixed limitation period of sixty days and further constrains the granting of extensions); *In re Alton*, 837 F.2d 457, 459 (11th Cir. 1988) (finding that Rule 4007(e) is mandatory and does not allow the court any discretion to grant a late-filed motion for extension).

275 B.R. at 213.

These three decisions from the Fifth, Tenth and Eleventh Circuits cited in *Rowland* each follow the jurisdictional view. In *Neely*, the Fifth Circuit found that the time set by Rule 4007 was fixed and could only be extended by a motion filed before the 60-day time limit expired. 815 F.2d at 346. Thus, it held that an objection filed ten days after the deadline was untimely, even though the clerk erroneously informed the creditor that no deadline was set. *Id.*

Similarly, the Eleventh Circuit in the *Alton* case relied on the Fifth Circuit's decision in *Neely* and held that the Rule 4007 deadline was "mandatory" and the

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[1] Objections to a general discharge are governed by Rule 4004, and objections to the discharge of a particular debt are governed by Rule 4007. The court below found that "[be]cause the two rules were almost identical, it is appropriate to consider decisions construing Rule 4007(c) as well as 4004(a)." App. at 8, n.3.

lower court had no discretion to grant a late-filed motion to extend the time. 847 F.2d at 458. Later, in *In re Coggin*, 30 F.3d 1443 (11th Cir. 1994), the Eleventh Circuit referred to the deadline in Rule 4004 as a "jurisdictional requirement" and a "jurisdictional bar" when considering when a complaint is filed. *Id.* at 1450-51. Finally, in *Barnes*, the Tenth Circuit relied on the Fifth and Eleventh Circuits' decisions in *Neely* and *Alton* to hold that a creditor could not add a new objection after the deadline had passed. The Tenth Circuit held: "[w]e agree that the Rule 4007(c) filing requirements are jurisdictional." *Id.* * 1.[2]

2. The Second, Fourth and Seventh Circuits Follow the Non-Jurisdictional View

The Second Circuit adopted the non-jurisdictional view in *In re Benedict*, 90 F.3d 50 (2d Cir. 1996). In *Benedict*, the court first recognized that courts are "divided" on the issue. *Id.* at 53-54. It then reviewed a line of cases holding that the time limit is jurisdictional. *Id.* It also noted another line of cases which do not reach the jurisdictional issue, but still allow late filings if the objector was "misled" by the court. After considering this authority, it decided to follow a "third" line of cases holding that the time period is not jurisdictional because, according to the Second Circuit, "the time limits in Rule 4007 were just another statutory deadline that would be subject to waiver, estoppel or equitable tolling." *Id.* at 54.

The Fourth Circuit also considered the split of authority in *Farouki v. Emirates Bank Int'l. Ltd.*, 14 F.3d 244 (4th Cir. 1994). In *Farouki*, the court recognized that

[2] Under the Tenth Circuit's rules, an unpublished opinion, though not binding precedent, may (unlike other circuits) still be cited if it has "persuasive value" on an issue not already addressed in a published opinion and it would assist the court. 10th Cir. R. 36.3(B).

decisions such as *In re Barley*, 130 B.R. 66, 68 (Bankr. N.D. Ind. 1991) hold that the time limit is a "jurisdictional prerequisite." However, the Fourth Circuit rejected that view in favor of a decision of the Ninth Circuit bankruptcy appellate panel in *In re Santos*, 112 B.R. 1001 (B.A.P. 9th Cir. 1990), finding it more "well reasoned." The *Santos* decision held that the time limit could be extended based on "equitable" considerations. *Id.* at 1006-08.

The court below also recognized the division of authority over whether the time for objecting to discharge is jurisdictional. App. at 7-8. Its opinion contains an extended discussion of a decision many courts have followed over the past 16 years—*In re Kirsch*, 65 B.R. 297 (Bankr. N.D. Ill. 1986). *Id.* at 9-11. In *Kirsch*, the court found that the deadline in Rule 4007 is "set in stone" and, based on the express language of another bankruptcy rule, Rule 9006(b), may only be extended "by a motion filed before the Rule 4007(c) time expires." *Id.* at 301. The court in *Kirsch* also relied on the fact that Rule 9006(b) is "modeled" after Fed. R. Civ. P. 6(b), which limits the enlargement of time for certain post-trial motions only to the extent expressly stated in the rules. Since the time limits for such post-trial motions are considered jurisdictional, the court in *Kirsch* held that Rule 4007 was also jurisdictional and could not be waived:

> This interpretation ... accords with the general rule that discharge and dischargeability law and procedure is to be interpreted strictly against creditors and in favor of debtors to promote a debtor's fresh start.

Id. at 302.

The Seventh Circuit found that the *Kirsch* decision provided a "thoughtful effort." App. at 9. However, it still rejected the *Kirsch* line of cases in favor of

what it called "policy concerns that animate the bankruptcy rules at issue." *Id.* at 10. In doing so, the court attempted to distinguish *Kirsch* solely on the basis that the deadlines set by Rule 6(b) for post-trial motions were necessary to prevent "uncertainty" *after* judgment, while the deadlines set by the bankruptcy rules involved deadlines *before* judgment. *Id.* at 10-11. Yet the court cited no authority for why postjudgment deadlines had a greater significance than prejudgment deadlines. It also did not explain why the certainty promoted by the bankruptcy rules is less important than the deadlines for post-trial motions.

After its attempt to distinguish *Kirsch*, the court concluded it would also follow the bankruptcy appellate panel's decision in *Santos*, stating: "[W]e join our colleagues in the Second and Fourth Circuits in holding that the timeliness provisions at issue are not jurisdictional." *Id.* at 14. And, as such, there exists a direct conflict between the Fifth, Tenth and Eleventh Circuits which follow the jurisdictional view, and the Second, Fourth and Seventh Circuits which do not.

B. The Split of Authority Among the Circuits Is Even More Compelling Because of the Ongoing and Widespread Conflict Between the District and Bankruptcy Courts.

This division of opinion among the circuits is all the more significant because the district and bankruptcy courts continue to struggle with this issue on a regular basis and have produced sharply divergent views. In what is often referred to as the "majority," courts have held that the deadlines for objecting to discharge are "jurisdictional." *See, e.g., In re Rinde*, 276 B.R. 330, 333 (D. R.I. 2002) (court adopts jurisdictional view taken by the "majority of courts that have addressed this question"); *In re Lufkin*, 256 B.R. 876, 879 (Bankr. E.D. Tenn. 2000) ("The majority of courts, however,

treat the time limit of Rule 4007(c) as a jurisdictional requirement"); *In re Goodwin*, 215 B.R. 710, 714 (Bankr. W.D. Tenn. 1997) ("majority of courts" have determined that time limit is jurisdictional); *In re Glover*, 212 B.R. 860, 861 (Bankr. S.D. Ohio 1997) ("majority" adhere to jurisdictional view); *In re Ham*, 174 B.R. at 107, n.4 (jurisdictional view "represents the majority of courts" citing *Neely* and *Alton*); *In re Booth*, 103 B.R. 800, 801 (Bankr. S.D. Miss. 1989) ("majority of courts" disagree that deadline may be waived).

The depth and breadth of this division of authority may be seen by a brief survey of the state of the law in each circuit.

First Circuit – The First Circuit has made no definitive ruling on this issue. However, the most recent ruling from this circuit follows the jurisdictional view. *See Rinde*, 276 B.R. at 333 (court adopts jurisdictional view, citing seven other decisions in support). Yet another court within the First Circuit takes the opposite view. *In re Walker*, 195 B.R. 187, 204 (Bankr. D. N.H. 1996) (Rule 4007 is not jurisdictional).

Second Circuit – Based on its decision in *Benedict*, the Second Circuit is in the non-jurisdictional camp. Yet *Benedict* itself has recently been singled out for criticism as representing the "minority view." *Lufkin*, 256 B.R. at 879.

Third Circuit – The Third Circuit also has not made a conclusive ruling on whether Rules 4004 and 4007 are jurisdictional. However, the most recent decision from the Third Circuit in *Rowland* contains a detailed analysis of the state of the law and comes down solidly on the side of the jurisdictional view: "We believe that the Third Circuit would interpret Rule 4007(c) similarly, and we hold here that the deadline in that rule is jurisdictional." 275 B.R. at 215. Also, in *In re Poskaner*, 146 B.R. 125, 131 (D. N.J. 1992), the district

court held that the rule is jurisdictional and its opinion has been cited frequently in support of that view. *See, e.g., Rinde*, 276 B.R. at 333 (court states that it "adopts the jurisdictional view taken by *Poskanzer* and the majority of courts that have addressed this question").

Fourth Circuit – As shown above, the Fourth Circuit follows the non-jurisdictional view. *Farouki*, 14 F.3d at 247.

Fifth Circuit – As shown above, the Fifth Circuit follows the jurisdictional view. *Neely*, 815 F.2d at 346; *see also In re Thomas*, 203 B.R. 64, 67 (Bankr. S.D. Tex 1996) (court holds it is "without jurisdiction" to consider untimely objection to discharge).

Sixth Circuit – The Sixth Circuit itself has not made a definitive ruling on the issue. However, recently in *In re Leet*, 274 B.R. 695 (B.A.P. 6th Cir. 2002), the bankruptcy appellate panel for the Sixth Circuit held in favor of the jurisdictional view. In *Leet*, the panel also noted the division of authority within the lower courts of the Sixth Circuit. For example, in *In re Begue*, 176 B.R. 801 (Bankr. N.D. Ohio 1995) the court treated the deadline as a statute of limitation that could be waived. However, the court in *Leet* found that "most of these courts [in the Sixth Circuit] agree with the majority rule that the time limits in Rule 4007(c) are jurisdictional." 274 B.R. at 697.

Seventh Circuit – Until this case, the prevailing view of the lower courts in the Seventh Circuit was that the deadlines are jurisdictional. *Kirsch*, 65 B.R. at 302; *Ham*, 174 B.R. at 106-07 (court dismisses untimely complaint "for lack of jurisdiction" citing *Kirsch*); *Barley*, 130 B.R. at 69 (court expressly rejects *Santos*: "A timely complaint is a jurisdictional prerequisite"); *In re Krause*, 114 B.R. 582, 605 (Bankr. N.D. Ind. 1988) ("the deadlines set by the Bankruptcy Rules are jurisdictional").

Eighth Circuit – The Eighth Circuit has not reached the issue of whether the deadlines are jurisdictional. However, recently in *In re Moss*, 289 F.3d 540, 541 (8th Cir. 2002), the Eighth Circuit followed what is sometimes referred to as yet another view—namely, that an untimely objection may be excused, but only if it is the result of the court's own error.

Ninth Circuit —The Ninth Circuit itself has not ruled on the issue. However, the decision of its bankruptcy appellate panel in *Santos* provided the basis for the Fourth and Seventh Circuits to follow the non-jurisdictional line. Yet, even among the non-jurisdictional line of cases, the courts do not uniformly embrace *Santos*. For example, in *In re Dombroff*, 192 B.R. 615, 619 (S.D.N.Y. 1996) the court adopted the non-jurisdictional view, but at the same time rejected the reasoning in *Santos* as "misplaced." In addition, within the Ninth Circuit, there is authority directly contrary to *Santos*. *See In re American Sports Innovation*, 105 B.R. 614, 615 (Bankr. W.D. Wash. 1989) (the "deadline for filing dischargeability complaints is jurisdictional").

Tenth Circuit – As shown above, based on the Tenth Circuit's holding in *Barnes*, it adheres to the jurisdictional view.

Eleventh Circuit – The most recent decisions from the Eleventh Circuit continue to follow the jurisdictional view. *In re Tucker*, 263 B.R. 632, 636 (Bankr. M.D. Fla. 2001) (absent "extraordinary circumstances the deadlines are "jurisdictional and non-waivable"); *In re Dollar*, 257 B.R. 364, 367 (Bankr. S.D. Ga. 2001) (deadlines are jurisdictional); *In re Ginn*, 179 B.R. 349, 352 (Bankr. S.D. Ga. 1995) (deadlines in Rules 4004 and 4007 "raise a jurisdictional bar").

This survey underscores that the jurisdictional versus non-jurisdictional debate is ongoing, widespread and has created a state of confusion in the law.

Such a disarray in the law thwarts a uniform treatment of rules that are integral to bankruptcy's fresh-start policy. As a result, the rules for objecting to discharge now vary depending upon in which part of the country a person files bankruptcy.

In addition, there is yet another dimension to this conflict. This Court promulgates the Bankruptcy Rules under its own authority. *See* 28 U.S.C. § 2075. As such, this issue also calls upon this Court's supervisory role over federal rules.

Finally, the issue in this case is concrete and ripe for decision—if the respondent's claim was untimely, then the decision of the Seventh Circuit must be reversed. In sum, the reasons for this Court to accept review are compelling. The issue involves this Court's supervisory role over a rule that is central to bankruptcy law, and continues to divide courts across the country in a way that undermines the uniform administration of our bankruptcy system. This division of authority will not go away on its own, and there is only one place where it can be settled. This Court alone can resolve the conflict.

C. The Opinion Below Is Also Directly Contrary to this Court's Opinion in *Taylor v. Freeland & Kronz*—Indeed, Courts Following the Jurisdictional View Rely on *Taylor*

Not only is there a deep division among courts at all levels on this issue, the decision below is also directly contrary to this Court's decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). In *Taylor*, the Court considered the closely analogous Bankruptcy Rule 4003. This rule requires that objections to a debtor's claims of exempt property be filed within 30 days of the meeting of creditors. In *Taylor*, this Court held in an 8-to-1 decision that even though the debtor had no reasonable basis to claim an exemption, an objection made

after the Rule 4003 deadline was untimely and could not be considered under any type of equitable exception. *Id.* at 643-44. Justice Thomas, writing for the Court, stated: "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Id.* at 644.[3]

Since *Taylor* was decided ten years ago, the lower courts have relied upon it repeatedly as mandating the jurisdictional view for objections to discharge. For example, most recently in *Leet*, the Sixth Circuit's bankruptcy appellate panel relied on *Taylor* to adopt the jurisdictional view. In particular, the panel found that "Rule 4003(b), the focus of attention in *Taylor* is similar to the rule at issue in this case, 4007(c), in that both rules provide a time limit within which papers must be filed." 274 B.R. at 697.

Again this year in *Rowland*, the court relied on this Court's affirmance of the Third Circuit in *Taylor* to support the jurisdictional view. 275 B.R. at 214-15. Similarly, in *In re Glover* the court relied on *Taylor* to adopt the jurisdictional view: "[Taylor] has made it clear that the deadlines set by the Bankruptcy Rule are jurisdictional in nature." 212 B.R. at 862. And once again, in *Thomas*, the court relied on *Taylor* to find that Rule 4007 was jurisdictional and stated, "the Court therefore holds that the *Taylor* 'plain meaning' construction applies to discharge and dischargeability actions." 203 B.R. at 68.

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[3] The Fifth and Sixth Circuits have held that the Rule 4003 deadline is jurisdictional. *In re Stoulig*, 45 F.3d 957, 957 (5th Cir. 1995) (affirming district court ruling that the bankruptcy court was "without jurisdiction to grant an extension of time to file objections" after the deadline expired); *In re Laurain*, 113 F.3d 595, 597 (6th Cir. 1997) (Rule 4003 should be "viewed as jurisdictional").

The court below attempted to distinguish *Taylor* in a lengthy footnote. App. at 14-16, n.4. The court began its analysis by recognizing that the panel in *Leet* reached a different result. *Id.* After a detailed description of the holding in *Taylor*, the court's reason for distinguishing it was that *Taylor* did not state that a debtor had "an unlimited time in which to object" or that Rule 4003 was not "subject to usual equitable doctrines that apply to other deadlines and statutes of limitations." *Id.* However, whether other equitable defenses might apply to Rule 4003 was not at issue in *Taylor*. Further, at the end of its analysis and as an additional attempt to bolster its conclusion, the Seventh Circuit also noted that the doctrine of waiver serves to promote finality. *Id.* at 15. That statement is true enough as to waiver generally. However, it does not answer the question of whether the deadline is jurisdictional in the first place.

Thus, the Seventh Circuit's rationale cannot be squared with the reasoning in *Taylor*. The *Taylor* decision hinged on this Court's strict interpretation of the time limit set by Rule 4003. And based on that strict application of the rule, this Court did not recognize any "equitable exception" to the deadline—even in the face of an exemption claimed without a good faith basis. Therefore, if this Court rejected an equitable exception for "bad faith," there is no reason that it would, at the same time, still have kept the door open for other equitable exceptions such as waiver. If anything, the Seventh Circuit's opinion is far closer to Justice Stevens' dissenting opinion in *Taylor* that would allow equitable exceptions to the deadline. *Id.* at 646-49. In sum, the Seventh Circuit's decision cannot be reconciled with *Taylor*. As the panel in *Leet* found, *Taylor's* strict application of Rule 4003 applies equally to the similar deadlines in Rules 4004 and 4007, and thus mandates the jurisdictional view.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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In the
United States Court Of Appeals
for the Seventh Circuit

No. 01-2683

IN RE: ANDREW J. KONTRICK,

Debtor-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 00 C 5736—**Harry D. Leinenweber**, *Judge*.

ARGUED JANUARY 10, 2002—DECIDED JULY 8, 2002

Before HARLINGTON WOOD, JR., RIPPLE and ROVNER, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Dr. Andrew Kontrick filed a Chapter 7 bankruptcy petition on April 4, 1997. Dr. Robert Ryan, a judgment creditor, then filed an adversary proceeding objecting to Dr. Kontrick's discharge. Ruling on summary judgment, the bankruptcy court denied Dr. Kontrick discharge under 11 U.S.C. § 727(a)(2)(A). The district court affirmed the bankruptcy court's decision. Dr. Kontrick now appeals and raises three objections to the bankruptcy court's decision. First, he argues that Dr. Ryan's complaint was untimely. Second, he argues that the bankruptcy court incorrectly concluded that he had waived his objection to the timeliness of Dr. Ryan's complaint and, further, that he could not have waived such an objection be-

cause Federal Rule of Bankruptcy Procedure 4004(a)'s time limit is jurisdictional and not subject to waiver. Finally, Dr. Kontrick contends that the bankruptcy court improperly granted summary judgment because there is a genuine issue of material fact about his intent in transferring his paychecks to his wife in the year before bankruptcy. For the reasons set forth in this opinion, we affirm the judgment of the district court.

I

A. Facts

Dr. Ryan and Dr. Kontrick, both cosmetic and plastic surgeons, were business associates. Each was a 50% shareholder in a professional corporation that Dr. Ryan had established. Dr. Kontrick had begun as an employee of the corporation and then, in 1989, he became part-owner. The association of the two physicians in this arrangement was a short and unhappy one. A variety of disputes, the details of which are not material to this appeal, arose. These disagreements were heard in two separate arbitrations. In the first, commenced in January 1992, Dr. Ryan was awarded $47,157.81 plus interest, expenses and attorneys' fees. Dr. Kontrick paid a total of $65,261.32 in satisfaction of this first arbitration. The second arbitration, commenced in October 1992, resulted in a 1995 award to Dr. Ryan of $519,324.42, including punitive damages, costs, expenses and attorneys' fees. The Circuit Court of Cook County entered a judgment on the award; the Illinois Appellate Court later reversed the punitive damages award and reduced the prejudgment interest rate. *See Ryan v. Kontrick*, 710 N.E.2d 11 (Ill. App. Ct. 1999).

During the first arbitration, Dr. Ryan filed a citation to discover Dr. Kontrick's assets. In an ensuing deposition, Dr. Kontrick was asked about his family finances, including his decision to remove his name from

the family checking account. Dr. Kontrick testified that personal expenses were paid from that account, now only in his wife's name, and admitted that "[i]t used to be my personal account. I don't have that account anymore." R.16-1, Ex. 7 at 7-8; *see id.* at 10-11, 17-19. He continued: "What prompted this change was the ridiculous maneuvers that you and your client [Dr. Ryan] have put me through in order to collect money which you don't have coming to you." *Id.* at 9. Dr. Kontrick further elaborated, stating that "there are just thousands and thousands of thieves out there that are ready to come after you on any pretense and rob you of whatever belongings you might have. So I felt this was a way of protecting myself." *Id.* at 12. In Dr. Kontrick's view, this arrangement would protect him from people who were "more than willing to take your money on some pretense or some technicality that they push through some court and all kinds of wranglings. As you know, this is exactly what went on." *Id.* To protect himself from individuals, whom he identified as former patients who have suffered "some perceived wrong," Dr. Kontrick divested himself of his personal wealth, transferring much of it to his wife and daughter. *See id.* at 13-14. As part of this effort to insulate his assets from potential judgment creditors, Dr. Kontrick removed his name from the family checking account, leaving his wife as the sole signatory; he continued to deposit his paychecks into that account. *See id.* at 17-19. Summing up his approach to his finances, Dr. Kontrick testified that "I felt that to have any sort of assets that could possibly be taken away from me would be foolish. So I basically divested myself of everything." *Id.* at 29-30.

B. Bankruptcy Court Proceedings

Dr. Kontrick filed for bankruptcy in April 1997. On January 13, 1998, Dr. Ryan, after having been

granted three extensions of time, filed his adversary complaint objecting to Dr. Kontrick's discharge. This adversary complaint included four counts (I-IV) objecting to discharge under 11 U.S.C. §§ 727(a)(2)-(5) and three counts (V-VII) seeking a determination of the nondischargeability of Dr. Kontrick's debts to Dr. Ryan under 11 U.S.C. §§ 523(a)(2), (4) & (6). Dr. Ryan filed an amended complaint on May 6, 1998, without a court-approved extension, which included for the first time the specific allegation that Dr. Kontrick had violated § 727(a)(2)(A) by taking his name off of a family checking account ("family account") and continuing to deposit his paychecks into the account.[1] Dr. Kontrick answered the amended complaint on June 10, 1998; in his answer, Dr. Kontrick admitted the transfers to the family account but denied violating § 727(a)(2)(A).

In March 1999, Dr. Ryan moved for summary judgment on all counts. Appended to his motion was a statement of facts pursuant to Local Bankruptcy Rule 402 ("402 M statement"). In August 1999, Dr. Kontrick filed a motion to strike portions of Dr. Ryan's 402 M statement. Dr. Kontrick maintained that "Ryan's 402 M statement contains an array of material that is not tied to anything alleged in the complaint." R.10-1, Ex. 12 at 2. In this motion, Dr. Kontrick quoted Dr. Ryan's amended complaint for the purpose of comparing the allegations in the amended complaint with the facts claimed in the 402 M statement. Dr. Kontrick also filed a cross-motion for summary judgment.

The bankruptcy court granted Dr. Ryan's motion for summary judgment on Count I. The court also granted in part and denied in part Dr. Kontrick's motion to strike. The court found that, because

[1] The original complaint included an objection to discharge based on § 727(a)(2)(A), but did not include a factual allegation with respect to the family account.

Dr. Kontrick continued to place his paycheck into the family account, there was a transfer within one year of bankruptcy, as required by § 727(a)(2)(A). Further, the court reasoned that, although "[g]enerally, the question of intent will prevent the granting of summary judgment . . . here, the Debtor's intent is clear." Bankr. Op. at 14. "Kontrick, during the deposition pursuant to the citation to discover assets, freely admitted he transferred the bank account to Carolyn [his wife] to prevent his creditors from attaching the funds." *Id.* at 14-15. Therefore, the court concluded, Dr. Kontrick had made transfers within one year of bankruptcy with the "intent to hinder, delay, or defraud his creditors" within the meaning of § 727(a)(2)(A). The court denied discharge and then dismissed the remaining counts in Dr. Ryan's complaint.

Dr. Kontrick filed a motion to reconsider the bankruptcy court's decision. He argued that he had objected to the timeliness of Dr. Ryan's amended complaint and that the family account claim was improperly considered because it was untimely under Bankruptcy Rule 4004(a). In denying the motion to reconsider, the bankruptcy court held that Dr. Kontrick had waived an objection to the timeliness of the family account claim.

C. District Court Proceedings

Dr. Kontrick appealed the bankruptcy court's decision to the United States District Court for the Northern District of Illinois. Dr. Kontrick submitted that the bankruptcy court had erred in finding that he had waived his Rule 4004(a) objection and that, even if he had failed to raise the objection, it could not be waived because Rule 4004(a) is jurisdictional and thus not subject to equitable doctrines such as waiver. Dr. Kontrick also contended that the bankruptcy court erred in granting summary judgment because there

was a genuine issue of material fact about his intent in transferring his paycheck to his wife's account in the year before bankruptcy.

The district court rejected all of Dr. Kontrick's arguments. First, the court concluded that Rule 4004(a) was not jurisdictional; it was more like a statute of limitations and could be waived. Second, the court determined, that, although Dr. Kontrick had mentioned that the amendment was late in his motion to strike, he did not raise the issue in his responsive pleading and thus had waived it. Finally, the court agreed with the bankruptcy court that Dr. Kontrick's deposition testimony from 1993 was conclusive on the issue of intent and affirmed the bankruptcy court's grant of summary judgment.

II

A.

We turn first to the timeliness of Dr. Ryan's objection to the discharge in bankruptcy. There is no dispute that Dr. Ryan's amended complaint, which included the family account allegation, was filed beyond the 60-day limit for filing objections and that there was no court-approved extension of time permitting him to file when he did.[2] The bankruptcy court and the district court concluded that Dr. Kontrick had waived any objections to the timeliness of Dr. Ryan's

[2] Neither the bankruptcy court nor the district court discussed whether the family account allegation properly related back to the timely complaint of January 13, 1998, such that the family account claim itself was timely. *See In re Magno*, 216 B.R. 34, 37-40 (BAP 9th Cir. 1997). Both courts assumed that the amended complaint and the family account allegation of May 6,1998, were untimely. Dr. Ryan does not contest this assumption on appeal. Therefore, we shall proceed in the same fashion as the bankruptcy and district courts and assume that the amended complaint was untimely.

complaint. To determine whether the 60-day time limit precludes consideration of Dr. Ryan's objection to discharge, we must engage in a two-part inquiry. First, we must decide whether the 60-day time limit for filing objections to discharge under § 727(a), *see* Fed. R. Bankr. P. 4004(a), is a jurisdictional prerequisite that cannot be waived, or whether it is akin to a statute of limitations and thus subject to waiver. If Rule 4004(a) is a jurisdictional requirement, then Dr. Kontrick cannot have waived his objection. Second, if we determine that the time limit is not jurisdictional, we must decide whether the bankruptcy court correctly determined that Dr. Kontrick did indeed waive objection.

1.

We first focus on whether the time limit for filing objections to discharge contained in Federal Rule of Bankruptcy Procedure 4004(a) is a jurisdictional prerequisite and, therefore, cannot be waived. "Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling." *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985). Our task is to determine whether Rule 4004(a) is an exception to this principle. This question has divided the bankruptcy courts that have had occasion to confront it. *Compare In re Santos*, 112 B.R. 1001, 1008 (BAP 9th Cir. 1990) (holding that Rules 4004(a) and 4007(c) are subject to waiver); *In re Steiner*, 209 B.R. 281, 286 (Bankr. E.D.N.Y. 1996) (same); *In re Walker et al.*, 195 B.R. 187, 206-07 (Bankr. N.H. 1996) (same); *In re Begue*, 176 B.R. 801, 804 (Bankr. N.D. Ohio 1995) (same), *with In re Glover*, 212 B.R. 860, 861 (Bankr. S.D. Ohio 1997) (holding that time limits are jurisdictional and not subject to waiver); *In re Ham*, 174 B.R. 104, 106-07 (Bankr. S.D. Ill. 1994) (same); *In re Kirsch*, 65 B.R. 297, 299-303 (Bankr. N.D. Ill. 1986) (same). United States Courts of Appeals opinions, however, have produced unanimity. *See In re Benedict*,

90 F.3d 50, 54-55 (2d Cir. 1996) (holding that time limits are not jurisdictional and thus are subject to equitable defenses); *Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244, 248 (4th Cir. 1994) (same).

We begin with the text of the provision in issue. Rule 4004(a) provides: "In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors." Fed. R. Bankr. P. 4004(a). The analogous provision to Rule 4004(a) for objections to the dischargeability of a particular debt is Rule 4007(c) which provides: "A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." Fed. R. Bankr. P. 4007(c). Both of these rules contain provisions for the extension of the time limit. Rule 4004(b) permits the bankruptcy court to extend the time limit for cause, if the motion is filed before time expires. *See* Fed. R. Bankr. P. 4004(b). Rule 4007(c) has a similar provision for extending its time limit. *See* Fed. R. Bankr. P. 4007(c).[3]

As the opinions of the courts that have confronted this issue demonstrate, the texts of these bankruptcy rules yield no definitive answer to the question of whether the time limitations contained in these rules are jurisdictional in nature. The rules we have just described do not, as a matter of textual interpretation, address the issue. Although Rule 9006(3) restricts the grounds upon which the bankruptcy court may enlarge the time for actions required by Rules 4004(a) and

[3] Because the rules are almost identical, it is appropriate to consider decisions by courts construing Rule 4007(c) as well as Rule 4004(a). *See In re Santos*, 112 B.R. 1001, 1004 n.2 (BAP 9th Cir. 1990).

4007(c), these restrictions still vest a great deal of discretion in the bankruptcy court.

In the absence of a clear textual resolution of the issue, we must look elsewhere. In our view, the decision of the United States Bankruptcy Appeals Panel of the Ninth Circuit in *In re Santos*, 112 B.R. 1001, 1005 (BAP 9th Cir. 1990), presents a sound framework for analyzing whether the time limitations of Rules 4004(a) and 4007(c) are jurisdictional. As that court noted, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-97 (1982), teaches that, in order to determine whether the filing requirements are jurisdictional, we must examine "the structure, legislative history and underlying policy of the provision in question and the related statutory scheme." *In re Santos*, 112 B.R. at 1005.

a.

We turn first to an examination of the role that these rules play within the overall structure of the bankruptcy rules in the hope that such an inquiry might yield a more definitive understanding of whether the rules in question ought to be governed by the general principle that a filing deadline is subject to equitable defenses or whether they are jurisdictional in nature.

In a thoughtful effort to apply this methodology, one bankruptcy decision, *In re Kirsch*, 65 B.R. 297, 301-02 (Bankr. N.D. Ill. 1986), reasoned that the situation presented by these bankruptcy rules is analogous to the one presented to this court in *Hulson v. Atchison, Topeka & Santa Fe Railway Co.*, 289 F.2d 726 (7th Cir. 1961). In *Hulson*, this court, applying the Federal Rules of Civil Procedure, held that the deadline for filing a motion for a new trial or a judgment notwithstanding the verdict under Rule 50(b) was jurisdictional and could not be extended pursuant to Rule 6(b). *See Hulson*, 289 F.2d at 729. The bankruptcy court in *Kirsch* analogized Rule

6(b) to Bankruptcy Rule 9006(b). *See In re Kirsch*, 65 B.R. at 301-02. It first noted that Rule 9006(b) was modeled on Rule 6 and serves a similar purpose in describing the proper functioning of time limits elsewhere in the rules and in limiting the power of courts to enlarge the time limits contained in certain rules. The court then noted that Rule 6(b), although generally permitting the district court to enlarge the time in which an act must be done under the rules, specifically excludes from this general approach, actions "under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and wider 60(b), except to the extent and under the conditions stated in them." *See In re Kirsch*, 65 B.R. at 301 (quoting Fed. R. Civ. P. 6(b)). In *Hulson*, this court had said that the time limitations contained in Rules 50(b), and 59(b), (d) and (e) prohibit the district court from acting on a motion not filed within the time specified in the rule. *See Hulson*, 289 F.2d at 729. Because Bankruptcy Rule 9006(b) contains the same limit with respect to Rule 4004(a), reasoned the court in *Kirsch*, the limitations in Rule 4004(a) also are not subject to judicial abrogation. *See In re Kirsch*, 65 B.R. at 302.

In light of the policy concerns that animate the bankruptcy rules at issue, we do not think that the analogy to the civil rules relied upon by the court in *Kirsch* is very helpful in resolving the problem before us. Rule 50(b) and the other civil rules referenced in Rule 6(b) govern actions after a final judgment has been entered. Unless the time limits are strictly construed, a prevailing party will be left uncertain as to the status of his judgment. Substantial prejudice to a prevailing party could occur if the defeated party had an indefinite time period to seek a new trial. By contrast, Rules 4004(a) and 4007(c) apply before any adjudication has taken place and govern the timeliness of a complaint, which in turn invites a responsive pleading, an answer. A debtor can defeat an untimely complaint by raising

Rule 4004(a) or Rule 4007(c) as an affirmative defense in his answer. Although there is an important interest in limiting the time in which the dischargeability of debts can be challenged in order to ensure that debtors are not "harassed by creditors after their claims have been discharged in bankruptcy," *Kirsch*, 65 B.R. at 300, we do not think that it is at all evident that Congress intended to limit the authority of the bankruptcy court so rigidly as to preclude all relief from the time constraints of the rule. Notably, Rules 4004(b) and 4007(c) explicitly permit the bankruptcy court to enlarge the time for filing a complaint objecting to discharge. As the court pointed out in *In re Santos*, 112 B.R. at 1006, if Rule 4004(a) is jurisdictional, then even a final judgment would be subject to collateral attack, a result that would hardly serve the Bankruptcy Code's goal of promoting certainty and finality for debtors. Were we to hold that these rules were jurisdictional, bankruptcy judgments would be subject to collateral attack after the bankruptcy court has completed its work and after the parties have complied with the court's mandate. *See In re Santos*, 112 B.R. at 1006. This situation would be "clearly at odds with the purpose of promoting finality and certainty of relief." *Id.*

Even when the underlying policy concerns of the Bankruptcy Code are reviewed without reference to the analogy to the civil rules suggested in *Kirsch*, characterization of these bankruptcy rules as jurisdictional would yield too rigid a result to achieve the goals of the bankruptcy statute. As the bankruptcy panel pointed out in *Santos*, there are, to be sure, some goals of bankruptcy relief that are promoted by expeditious and definitive resolution of the question of dischargeability. Indeed, among the goals of the rules in question is furtherance of the prompt administration of bankruptcy estates and protection of the "fresh start" objective of the Code by allowing the debtor to enjoy finality and

certainty of relief. *See In re Santos*, 112 B.R. at 1006. However, as the panel in *Santos* also pointedly noted, these goals are best fostered, not by a rigid jurisdictional approach, but by the exercise of equitable discretion in a manner consistent with the policies that animate the Bankruptcy Code. *See id.* Indeed, as another Ninth Circuit bankruptcy panel intimated, requiring that an enlargement of time be sought during the period in which the complaint should have been filed, but nevertheless giving at least that limited opportunity evidences that Congress, although desirous of finality, realized that a rigid rule also could be inequitable at times and frustrate the goals of the Code. *See In Re Rhodes*, 61 B.R. 626, 629-30 (BAP 9th Cir. 1986).

b.

As the bankruptcy panel in *Santos* also noted, the overall statutory structure of the bankruptcy statute also provides support for the view that the rules are not jurisdictional. *See In re Santos*, 112 B.R. at 1005. The statutes granting jurisdiction to the bankruptcy and district courts over bankruptcy matters do not indicate that timeliness of objections to discharge is a jurisdictional predicate. *See* 28 U.S.C. §§ 157(b)(1), 1334. An "objection[ ] to discharge" is a "core proceeding[ ]" over which the bankruptcy court exercises jurisdiction. 28 U.S.C. § 157(b)(2)(J). Nowhere in the definition of core proceedings is the adjective "timely" used to define a core proceeding. Thus, there is nothing within § 157(b) to indicate that a bankruptcy court is precluded from considering untimely objections to discharge.

Matters of timeliness are, notably, present in other provisions. For instance, section 157(b)(3) states that "[t]he bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding." 28 U.S.C. § 157(b)(3). Further, for a party to obtain de novo re-

view in the district court of a bankruptcy court's findings of fact and conclusions of law in a non-core proceeding, that party must "timely and specifically object[ ]." 28 U.S.C. § 157(c)(1). These references to timeliness in sections other than the grants of jurisdiction support the view that timeliness is not a prerequisite to the bankruptcy court's exercise of jurisdiction in a core proceeding such as Dr. Ryan's objection to discharge.

c.

We find the legislative history of the rules in question to be of marginal assistance in our task. The notes of the Advisory Committee with respect to Rule 4007 state in part:

> Subdivision (c) differs from subdivision (b) by imposing a deadline for filing complaints to determine the issue of dischargeability of debts set out in § 523(a)(2), (4) or (6) of the Code. The bankruptcy court has exclusive jurisdiction to determine dischargeability of these debts. If a complaint is not timely filed, the debt is discharged. *See* § 523(c).

One plausible reading of this passage is, as the court in *Santos* acknowledged, that the bankruptcy court can only act on a dischargeability complaint if it is filed in a timely manner. *See Santos*, 112 B.R. at 1005. However, the notes to the 1999 amendments explicitly reiterate the right of a party to seek an enlargement of time, thus acknowledging that some flexibility was intended by the drafters. In any event, we agree with the panel in *Santos* that this passage in the Committee note is hardly conclusive or even persuasive in light of the structure and policy of the Code and the bankruptcy rules.

d.

Accordingly, we join our colleagues in the Second and Fourth Circuits in holding that the timeliness provisions at issue here are not jurisdictional. *See In re Benedict*, 90 F.3d 50, 53-54 (2d Cir. 1996); *Farouki v. Emirates Bank Int'l Ltd.*, 14 F.3d 244, 248 (4th Cir. 1994). These rule provisions are subject to equitable defenses, although those defenses must be applied in a manner consistent with the manifest goals of Congress to resolve the matter of dischargeability promptly and definitively in order to ensure that the debtor receives a fresh start unobstructed by lingering doubts about the finality of the bankruptcy decree.[4]

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[4] Contrary to Dr. Kontrick's assertion, we do not think that the Supreme Court's decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), requires a different result. *But see In re Leet*, 274 B.R. 695, 696-97 (BAP 6th Cir. 2002). In *Taylor*, the Court held that there was no good-faith exception to the time limits for filing objections to a debtor's list of exempt property. *See Taylor*, 503 U.S. at 644-45. Under 11 U.S.C. § 522(b), a debtor may claim certain property as exempt from his bankruptcy estate; the debtor may elect to use exemptions under state or federal law. *See* 11 U.S.C. § 522(b)(1)-(2). Section 522(1) describes the procedures for claiming such exemptions: "The debtor shall file a list of property the debtor claims as exempt. . . . Unless a party in interest objects, the property claimed on such list is exempt." *Id.* § 522(1). Bankruptcy Rule 4003(b) provides that "[t]he trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors." Fed. R. Bankr. P. 4003(b).

In *Taylor*, the debtor had claimed as exempt the proceeds from an employment discrimination lawsuit that was pending in state court at the time of her bankruptcy filing. *See Taylor*, 503 U.S. at 640. The parties agreed that there was no basis for her to claim an exemption for the full amount of the proceeds. *See id.* at 642. Nevertheless, the trustee declined to object to the exemption because he believed that the lawsuit was meritless. *See id.* at 641. He was incorrect, and the debtor eventually settled for about $110,000, a portion of which the debtor paid to her attorneys in the discrimination suit. *See id.* Upon learning of the settlement, the trustee returned to the bankruptcy court almost two years after the bankruptcy proceedings ended and demanded that the debtor and her attorneys turn over the funds on the ground that they were the property of the bankruptcy estate. *See id.* The trustee argued that the time limits in Rule 4003(b) only applied to exemptions filed in good faith and because the debtor had no good-faith basis for claiming the exemption, the trustee was able to file his objection outside of the time limit. *See id.*

The Supreme Court rejected this argument. *See Taylor*, 503 U.S. at 642. The Court held that the deadline in Rule 4003(b) should be construed strictly: "By negative implication, the Rule indicates that creditors may not object after 30 days 'unless, within such period, further time is granted by the court.'" *Id.* at 643. Since no objection was filed within 30 days, the property was exempt by the operation of 11 U.S.C. § 522(1). *See id.* The Court noted that "despite what respondents repeatedly told him, [the trustee] did not object to the claimed exemption. If [the trustee] did not know the value of the potential proceeds of the lawsuit, he could have sought a hearing on the issue, see Rule 4003(c), or he could have asked the Bankruptcy Court for an extension of time to object." *Id.* at 644. Thus, the Court concluded that objections filed outside the time limit were untimely and should not have been considered by the bankruptcy court. *Id.* The Court further concluded that there was no statutory basis for reading a good-faith exception into § 522(1). *See id.* at 644-45. The Court did not hold, however, that the debtor had an unlimited time in which to object to the trustee's untimely objection or that Rule 4003(b) was not subject to the usual equitable doctrines that apply to other deadlines and statutes of limitations.

While the Court in *Taylor* did stress the importance of deadlines, *see Taylor*, 503 U.S. at 644, we believe this emphasis supports our conclusion, rather than undermines it. As the Court noted, "[d]eadlines may lead to unwelcome results, but they prompt parties to act and promote finality." *Id.* This analysis applies with equal force to the doctrine of waiver, which requires parties to put all of their arguments before the appropriate court at the appropriate time for a full resolution of their claims. Here, parties are prompted to action and finality is served by our conclusion that parties may waive any objection to the untimeliness of a creditor's complaint if the objection is

Having determined that an objection to the timeliness of a complaint under Rule 4004(a) is subject to waiver, we must now decide whether Dr. Kontrick did waive his objection. In making that determination, we must keep in mind the Congressional policy of resolving the matter of dischargeability promptly and of permitting the debtor to begin his fresh start without lingering doubts about the finality of the bankruptcy court's actions.

As a general matter, a statute of limitations defense must be raised in an answer or responsive pleading. *See* Fed. R. Civ. P. 8(c); *see also Jackson v. Rockford Housing Auth.*, 213 F.3d 389, 392-93 (7th Cir. 2000). Federal Rule of Civil Procedure 8 is incorporated into the Bankruptcy Rules. *See* Fed. R. Bankr. P. 7008. Dr. Kontrick filed his voluntary petition for relief under Chapter 7 on April 4, 1997. On January 13, 1998, Dr. Ryan filed his original adversary complaint. Later, on May 6, 1998, Dr. Ryan filed an amended complaint. Dr. Kontrick answered the amended complaint on June 10, 1998, without raising his Rule 4004(a) untimeliness defense.

Dr. Kontrick argues that he raised the issue in his motion to strike portions of Dr. Ryan's motion for summary judgment. Dr. Kontrick's motion to strike was filed on August 2, 1999. Even assuming, arguendo, that Dr. Kontrick's motion to strike was an acceptable vehicle for raising a Rule 4004(a) objection, we must conclude that Dr. Kontrick waived his objection to the timeliness of Dr. Ryan's complaint.

Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Sumner*, 265 F.3d 532, 537 (7th Cir. 2001). A waiver may be explicit or implicit. A party may waive an argument if

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not raised at the proper time.

it is not raised at the proper time. *See Carr v. O'Leary*, 167 F.3d 1124, 1126 (7th Cir. 1999). Generally, statute of limitations defenses must be raised in an answer or responsive pleading. *See* Fed. R. Civ. P. 8(c). With these principles in mind, we turn to an examination of Dr. Kontrick's motion to strike portions of the motion for summary judgment. In that motion, Dr. Kontrick submitted that "Ryan's Rule 402 M statement contains an array of material that is not tied to anything alleged in his complaint." R.10-1, Ex. 12 at 2. To support this argument, Dr. Kontrick then listed the allegations made in Dr. Ryan's amended complaint in order to compare them with factual statements in Dr. Ryan's 402 M statement. In short, he used the allegations of the amended complaint as a "baseline" to establish that the Rule 402 M statement went beyond the bounds of that complaint. Included within the excerpts from Dr. Ryan's amended complaint are his factual allegations under Count I, the objection to discharge under § 727(a)(2)(A). From paragraph 56 of Dr. Ryan's amended complaint, Dr. Kontrick recites: "Removing name from family bank account." *Id.* at 4. At the conclusion of this summary of Dr. Ryan's allegations, Dr. Kontrick states: "This is the extent of the allegations in the complaint. Ryan has not even attempted to amend his complaint to add additional allegations." *Id.* at 5.

What is clear from Dr. Kontrick's motion to strike is that he is relying on Dr. Ryan's amended complaint, including the family account claim, to object to additional allegations made in Dr. Ryan's 402 M statement. Nowhere does Dr. Kontrick contest the timeliness of the allegations in the amended complaint. This failure is sufficient to constitute waiver of Dr. Kontrick's objection to the timeliness of the complaint. Indeed, Dr. Kontrick did not raise the timeliness

issue until after the bankruptcy court entered summary judgment for Dr. Ryan.

Under these circumstances, we must conclude that Dr. Kontrick waived the argument that Dr. Ryan's allegation that discharge ought to be denied because of Dr. Kontrick's handling of his checking account was untimely. This conclusion is compatible with the general principles that govern the application of the waiver defense and is also compatible with the policies underlying the Bankruptcy Code. Here, the timeliness issue was not presented to the bankruptcy court until after it had ruled on the question of whether a discharge ought to be refused. The policy concerns of expeditious administration of bankruptcy matters and the finality of the bankruptcy court's decision hardly are fostered by requiring the bankruptcy court to consider the timeliness of an issue that it already has adjudicated.

B.

We must now determine whether the bankruptcy court properly granted summary judgment to Dr. Ryan and denied Dr. Kontrick his discharge. We review a grant of summary judgment de novo. *See In re Lefkas Gen'l Partners*, 112 F.3d 896, 899-900 (7th Cir. 1997). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party resisting summary judgment cannot succeed simply by resting on his pleadings, he must come forth with positive evidence in support of his position. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). There is no "genuine" issue of material fact "for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "When the moving party has carried its burden under Rule 56(c), its opponents must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In making this determination, all reasonable inferences must be drawn in favor of the nonmovant.

The bankruptcy court granted summary judgment on Count I of Dr. Ryan's complaint, which alleged that discharge should be denied because Dr. Kontrick had violated 11 U.S.C. § 727(a)(2)(A). Section 727(a)(2)(A) provides, in relevant part, that "[t]he court shall grant the debtor a discharge unless . . . the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred . . . property of the debtor, within one year before the date of the filing of the petition." 11 U.S.C. § 727(a)(2)(A). To prevail, Dr. Ryan must prove that (1) the debtor, Dr. Kontrick, (2) transferred (3) the debtor's property, (4) with the intent to hinder, delay, or defraud a creditor (5) within one year of bankruptcy. *See id.* The exception to discharge in § 727(a)(2)(A) essentially "consists of two components: an act (i.e., a transfer or a concealment of property) and an improper intent (i.e., a subjective intent to hinder, delay, or defraud a creditor)." *Rosen v. Bezner*, 996 F.2d 1527, 1531 (3d. Cir. 1993). "The party seeking to bar discharge must prove that *both* these components were present during the one year before bankruptcy; anything occurring before that one year period is forgiven." *Id.* (emphasis in original). In bankruptcy, "exceptions to discharge are to be construed strictly against a creditor and liberally in favor of the debtor." *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985). Even with these principles in mind, we believe that Dr. Ryan has satisfied the statute's prerequisites sufficiently to support the bankruptcy court's grant of summary judgment.

Dr. Kontrick does not dispute that he continued to deposit his paycheck into the family account in the year before bankruptcy. Instead, he argues that there is a question of fact about his intent and that there was no act to hinder, delay or defraud creditors within one year. *See* Appellee's Br. at 13. Dr. Kontrick cites *In re Ratner*, 132 B.R. 728, 733 (N.D. Ill. 1991), for the proposition that a debtor has no obligation to maintain a checking account for the benefit of his creditors. This proposition is true as far as it goes, but § 727(a)(2)(A) makes it clear that a debtor may not divest himself of property with the intent to hinder, delay or defraud his creditors and still receive a discharge. In *Ratner*, the court determined that the bankruptcy court had not committed error in concluding that the circumstances surrounding the use of a spouse's checking account did not supply sufficient circumstantial evidence to permit the conclusion that the debtor had attempted to evade payment to his creditors. Here, however, we have direct evidence of Dr. Kontrick's intent.

In his 1993 deposition pursuant to Dr. Ryan's citation to discover assets, Dr. Kontrick admitted that he took his name off the checking account, stating that "[i]t used to be my personal account. I don't have that account anymore." R.16-1, Ex. 7 at 7-8. Moreover, he said that he took this action because of "the ridiculous maneuvers that you and your client [Dr. Ryan] have put me through in order to collect money which you don't have coming to you." *Id.* at 9. Dr. Kontrick wanted to protect himself from the "thousands and thousands of thieves out there that are ready to come after you on any pretense and rob you of whatever belongings you might have." *Id.* at 12. Dr. Kontrick freely admitted that his divestitures were designed to diminish the amount of money creditors would be able to obtain from a judgment against him, including Dr. Ryan with whom Dr. Kontrick was engaged in a nasty business

dispute at the time. "I felt that to have any sort of assets that could possibly be taken away from me would be foolish. So I basically divested myself of everything." *Id.* at 29-30.

Intent is normally a question of fact and often not susceptible to summary judgment. Here, however, we have direct and unrebutted evidence, from Dr. Kontrick's own words, of his intent. Dr. Kontrick cannot defeat summary judgment simply by raising a "metaphysical doubt" about his intent. *See Matsushita*, 475 U.S. at 586. Dr. Kontrick has not put forth any evidence suggesting that his intent with respect to the family account changed between his 1993 deposition and his depositing his paycheck into the family account in the year before he filed for bankruptcy. There is also nothing in his circumstances to suggest that his intent was any different in 1997 than it had been in 1993. Dr. Kontrick's bitter dispute with Dr. Ryan was ongoing, with Dr. Kontrick owing to Dr. Ryan a judgment at one point valued at more than $600,000. The record contains no basis for the conclusion that, although Dr. Kontrick removed his name from the family account in late 1992 or early 1993 to thwart his creditors, his deposits in 1996 and 1997 were for a purpose permitted by the Code.

The bankruptcy court was entitled to conclude that those deposits were "transfers" of Dr. Kontrick's property, with the "intent to hinder, delay, or defraud a creditor" within one year of filing for bankruptcy. 11 U.S.C. § 727(a)(2)(A). By depositing his paycheck into an account over which he had no control, Dr. Kontrick put those assets beyond the reach of his creditors, just as he had done with the property that he transferred to his wife and daughter before 1993.

In support of his contention that summary judgment was inappropriate here, Dr. Kontrick invites

our attention to *Rosen v. Bezner*, 996 F.2d 1527 (3d Cir. 1993). In *Rosen*, the debtor transferred his interest in his principal residence to his wife on December 28, 1987 for no consideration. *See Rosen*, 996 F.2d at 1529. Almost two years later, on September 12, 1989, the debtor filed a chapter 7 bankruptcy petition. *See id.* at 1530. The trustee objected, arguing that the debtor had transferred his property with the actual intent to hinder, delay or defraud a creditor. *See id.* The bankruptcy court granted summary judgment to the trustee and the district court affirmed. *See id.* The Third Circuit reversed, and remanded the case to the bankruptcy court for a factual determination of the debtor's intent. *See id.* at 1533. Unlike this case, *Rosen* involved the application of the "continuing concealment" doctrine under which "a concealment will be found to exist during the year before bankruptcy even if the initial act of concealment took place before this one year period as long as the debtor allowed the property to remain concealed into the critical year." *Id.* at 1531. That doctrine is inapplicable when, as here, the transfers took place within one year of bankruptcy. Finally, unlike the court in *Rosen*, we have unrefuted evidence of Dr. Kontrick's intent in first arranging his finances as he did and no evidence to suggest that his intent has changed.

There is no genuine issue of material fact regarding the applicability section 727(a)(2)(A)'s exception to discharge. Dr. Kontrick violated section 727(a)(2)(A) by depositing his paycheck into the family account, over which he had no control. Dr. Ryan is entitled to judgment as a matter of law on Count I of his amended complaint.

Conclusion

Dr. Kontrick waived his objection to the timeliness of Dr. Ryan's amended complaint. The bankruptcy court properly granted summary judgment to Dr. Ryan and denied Dr. Kontrick's discharge under 11 U.S.C. § 727(a)(2)(A). The judgment of the district court sustaining that decision is therefore affirmed.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Dated August 27, 2002

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 01 - 2683

IN RE:
ANDREW J. KONTRICK,

Debtor-Appellant,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 00 C 5736

Harry D. Leinenweber,
Judge.

ORDER

Upon consideration of the Appellant's petition for rehearing *en banc*, filed on July 22, 2002, no judge in active service* has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc* is hereby DENIED.

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* The Honorable Joel M. Flaum and The Honorable Ann Claire Williams did not participate in the consideration of the suggestion for rehearing en banc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT A. RYAN,	Case No. 00 CV 5736
Plaintiff/Appellee,	Judge Harry D. Leinenweber
v.	(Appeal from adversary proceeding No. 98 113,
ANDREW J. KONTRICK,	Hon. John D. Schwartz, Bankruptcy Case No. 97 B
Defendant/Appellant.	10353)

MEMORANDUM OPINION AND ORDER

Andrew Kontrick ("Kontrick") filed for bankruptcy on April 4, 1997, and Robert Ryan ("Ryan") filed a seven-count complaint objecting to discharge on January 13, 1998. Ryan moved for summary judgment on Counts I-IV, and the bankruptcy court granted the motion on the "family account" claim in Count I and denied the motion as to Counts II-IV. Kontrick appealed the bankruptcy court's decision to this court.

INTRODUCTION

The following facts are taken from the bankruptcy court's Amended Memorandum Opinion.

Kontrick and Ryan are both physicians. In 1983 Kontrick joined Ryan's medical practice, and in 1989 he became a stockholder. Various disputes arose between them, and in July 1992 an arbitrator issued an award in favor of Ryan in the amount of $47,157.00. In October 1992, the parties were engaged in a second arbitration. In April 1993, Ryan attempted to settle all disputes between them for about $96,501.00, which Kontrick re-

jected. In June 1993, Ryan sought to collect the award from the first arbitration and served Kontrick with a citation to discover assets. In July 1993, however, Kontrick paid Ryan the full award in the first arbitration plus some additional fees and costs. In May 1995, the arbitrator entered an award for $519, 324.00 in the second arbitration, which included punitive damages. The Illinois Appellate Court later reversed and vacated the award of punitive damages and the rate of prejudgment interest while affirming the remainder of the award. *See Ryan v. Kontrick*, 304 Ill. App. 3d 852, 710 N.E. 2d 11 (1st Dist. 1999). Kontrick made a settlement offer to Ryan of $193,000.00, which Ryan rejected and he proceeded to file another citation to discover assets.

On April 4, 1997, Kontrick filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code (the "Code"). On January 13, 1998, Ryan filed his original adversary complaint with the court consisting of four counts seeking to deny Kontrick his discharge pursuant to §§ 727(a)(2), (3), (4) and (5), and three counts seeking a finding that Kontrick's debt to Ryan was nondischargeable pursuant to §§ 523 (a) (2), (4), and (6). On May 6, 1998, Ryan filed an amended complaint seeking the same relief and differing only in certain factual allegations. Kontrick answered the complaint on June 10, 1998. Ryan moved for summary judgment on Counts II-IV seeking to bar Kontrick from receiving his discharge pursuant to §§ 727(a)(2), (3), (4) and (5). Kontrick, in turn, moved to strike portions of Ryan's 402 (M) statement and certain of the attached exhibits. The bankruptcy court entered its original Memorandum Opinion on February 25, 2000, and then later amended the opinion to correct a factual error. The bankruptcy court granted Ryan's motion as to Count I denying Kontrick his discharge and denied summary judgment on Counts II-IV. Further, Kontrick filed a motion to reconsider, which was

denied on June 8, 2000. The bankruptcy court entered final judgment on June 13, 2000, and Kontrick filed an appeal.

In Count I Ryan argued, among many other things, that Kontrick should be denied discharge pursuant to § 727(a)(2) because he took his name off of the family bank account yet he continued to deposit his employment checks into that account (the "family account" claim). Kontrick and his wife, Carolyn Kontrick, used to have a joint checking account where Kontrick deposited his salary checks into the account, and Carolyn paid the family expenses out of the account. In 1992 or 1993, Kontrick removed his name from the checking account, but he continued to deposit his salary checks into the account and Carolyn continued to pay the family expenses from the account. In 1997, Kontrick filed for bankruptcy. The bankruptcy court found that Kontrick should be denied discharge because Kontrick deposited his salary into an account on which his wife is the sole signatory, the money transferred into the account is fraudulently transferred to Carolyn because she gave no consideration, and Kontrick made the transfer with the intent to defraud his creditors. (Exh. 2, at 14.) The bankruptcy court recognized that generally the question of intent will prevent the grant of summary judgment, but that this was not the usual case because Kontrick's intent was clear.

Kontrick raises two grounds in this appeal. First, he argues that Ryan's claim that these deposits into the checking account were a ground to bar his discharge was untimely. According to Kontrick, Ryan filed an amended complaint adding the family account claim as an additional ground after the time for objecting to discharge had expired. Second, Kontrick argues that the bankruptcy court erred when it denied him discharge pursuant to § 727(a)(2) because the deposits

to the account were used for family expenses and did not reduce the assets available to creditors and because there was no intent to hinder, delay or defraud his creditors.

DISCUSSION

Timeliness Issue

Kontrick argues the family account claim was untimely because Ryan did not allege in the original complaint but only in the amended complaint that was filed outside the strict 60-day period for filing complaints pursuant to FED. R. BANKR. P. 4004(a) ("Rule 4004(a)"). He argues that the bankruptcy court's opinion failed to address the timeliness of the family account claim by wrongly finding that Kontrick had waived this issue by failing to raise it in his motion to strike. He claims that he did object to the timeliness of the family account claim in his motion to strike, and even if he did not the court wrongly found that he waived his objection because "Rule 4004 is jurisdictional and cannot be waived." (Kontrick Brief, at 10.)

This court will first address whether Kontrick raised his objection to the timeliness of the family account claim in his motion to strike. In his brief to this court Kontrick pieces together quotes and sentences from his motion to strike in an attempt to demonstrate that he made the argument to the bankruptcy court. The court has reviewed Kontrick's motion to strike and finds, like the bankruptcy court, that he did state that there were new allegations in the amended complaint that were not in the original complaint. But, as the bankruptcy court concluded in its memorandum opinion on Kontrick's motion to reconsider, Kontrick "mentions that this allegation was not included in the original complaint . . . [h]owever, he does not continue the argument to any logical conclusion. He never argued that the allegation was untimely or should be

struck for any reason." (Exh 11, at 6.) In Kontrick's motion to strike he compared the allegations in the complaint with the allegations in Ryan's motion for summary judgment, memorandum, and Rule 402M statement. The point of Kontrick's motion to strike was that "any allegations in the *[sic]* Ryan's [summary judgment] memorandum or 402M statement that are not tied to the complaint should be stricken" and not that there were new allegations in the amended complaint that were not in the original complaint. (Motion to strike, at 5.) This court agrees with the bankruptcy court that Kontrick did not raise this issue in his motion to strike.

As Kontrick did not argue that the family account claim was untimely, the court must next consider whether Kontrick's failure to raise it constitutes a waiver of his objection. With very little discussion, the bankruptcy court held that FED. R. BANKR. P. is not jurisdictional but more akin to a statute of limitations, and thus, by not raising his argument that the checking account claim was untimely sooner, Kontrick waived it. (Exh. 11, at 6.)

Here, Kontrick argues that while the bankruptcy court's finding that Rule 4004 is not jurisdictional does find some support in case law, the majority of cases, especially those from this district, find that it is jurisdictional. He argues because Rule 4004 is jurisdictional, he could not have waived an objection to jurisdiction. To support his argument that Rule 4004 is jurisdictional, Kontrick relies heavily on *In re Kirsch*, 65 B.R. 297, 302 (Bankr. N.D. Ill. 1986). In *Kirsch*, Judge Ginsberg found that the defendant, who had answered the complaint and participated in the trial, did not waive his objection to the timeliness of the complaint because the time limit was jurisdictional and thus could not be waived. *Id.* at 302. Kontrick argues that the bankruptcy court erred

when it declined to follow *Kirsch* and the "majority" of courts and instead found that the time limit for discharge objections was not jurisdictional.

As a preliminary matter, discharge and dischargeability are governed by distinct procedural rules. Rule 4004 sets out the procedure for granting or denying discharge under § 727. Rule 4007 governs the determination of dischargeability of a debt under § 523. Both Rule 4004(a) and Rule 4007(c) set forth a strict 60-day deadline for filing a complaint and both rules permit the court to extend the 60-day limit during the initial 60-day period. Further, Rule 9006(b)(3) states that "[t]he court may enlarge the time for taking action under Rules . . . 4004(a) and 4007(c) . . ., only to the extent and under the conditions stated in those rules." Thus, once the 60 days permitted by Rule 4004(a) or 4007(c) have passed, the bankruptcy court cannot extend the time for filing a complaint.

Here, after several extensions of time, Ryan filed his complaint within the 60-day period, but he filed an amended complaint after the 60-day period. Kontrick argues that the family account claim appears for the first time in the amended complaint, while Ryan argues that it was in the original complaint and he just expanded his factual allegations in the amended complaint. The bankruptcy court found that Kontrick waived his objection without a specific finding that the family account claim was timely or not.

Several bankruptcy courts have held that the time limit for filing dischargeability complaints fixed by Rule 4007(c) is jurisdictional, and thus not subject to waiver. *See In re Glover*, 212 B.R. 860, 861 (Bankr. S.D. Ohio 1997); *In re Ham*, 174 B.R. 104, 106-107 (Bankr. S.D. Ill. 1994); *In re Barley*, 130 B.R. 66, 69 (Bankr. N.D. Ind. 1991); *In re Booth*, 103 B.R. 800, 802 (Bankr. S.D. Miss. 1989); *In re Krause*, 114 B.R. 582, 605 (Bankr. N.D. Ind.

1988); *In re Kirsch*, 65 B.R. 297 (Bankr. N.D. Ill. 1986). These cases base their holding that the time limits for filing dischargeability complaints fixed by Rules 4007(c) and 9006(b)(3) are jurisdictional on a finding that this was Congress' intention in drafting the bankruptcy code. These courts argue that this interpretation "accords with the general rule that discharge and dischargeability law and procedure is to be interpreted strictly against creditors and in favor of debtors to promote a debtor's fresh start." *Kirsch*, 65 B.R. at 302-303.

Here, the bankruptcy court, while acknowledging *Kirsch* as the ringleader of the bunch, declined to follow that line of cases and instead cited *European American Bank v. Benedict (In re Benedict)*, 90 F.3d 50 (2nd Cir. 1996) and *Dombroff v. Greene (In re Dombroff)*, 192 B.R. 615 (S.D.N.Y. 1996). The bankruptcy court explained that "[c]ontrary to the Debtor's assertion, this court does not believe the limitations period of FED. R. BANKR. P. 4004 is jurisdictional, but is more akin to a statute of limitations." (Exh. 11, at 6.)

In *Benedict*, the Second Circuit acknowledged the split of authority on this issue and held that the time period imposed in Rule 4007(c) was not jurisdictional and thus subject to waiver, estoppel, and equitable tolling. The *Benedict* court reasoned that statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling, there was nothing in the Bankruptcy Code that supports a finding that Rule 4007 is any different from a statutory provision that imposes a filing deadline, and there is no controlling policy goal that would be served by holding Rule 4007(c) jurisdictional. *Benedict*, 90 F.3d at 54. Further, in *In re Santos*, 112 B.R. 1001, 1008 (Bankr. 9th Cir. 1990), the Ninth Circuit held that "the timeliness of a dischargeability complaint presents an affirmative defense

that must be raised in an answer or responsive pleading . . . If the defense is not raised in the answer or responsive pleading, it is generally waived." Further, in *Farouki v. Emirates Bank International Limited*, 14 F.3d 244, 248 (4th Cir. 1994), the Fourth Circuit found *Santos* to be well reasoned and followed it, specifically finding that Rule 4004(a) is not jurisdictional. *See also, Dombroff*, 192 B.R. 615 ("this Court holds that the time period fixed by FED. R. BANKR. B. 4004 is not jurisdictional in nature."); *In re Begue*, 176 B.R. 801, 804 (Bankr. N.D. Ohio 1995) ("This court thus joins other courts that have viewed the deadline set forth in B. R. 4007(c) not as jurisdictional but rather as a statute of limitations. As such, this statutory filing deadline is subject to the defenses of waiver, estoppel and equitable tolling." (citations omitted)); *In re Welsh*, 138 B.R. 630, 631 (Bankr. M.D. Fla. 1992) (holding that Rule 4007(c) is procedural and not jurisdictional).

Further, other courts, while not explicitly holding that Rule 4004 was not jurisdictional, permitted equitable relief where the court misled the parties as to a filing deadline. *See, e.g., In re Themy*, 6 F.3d 688, 690 (10th Cir. 1993) (holding that when "the court's act affirmatively misleads the creditor as to a deadline . . . the bankruptcy court [is] within its authority to accept [the creditor's] complaint after the sixty-day period expire[s]"); *In re Kennerley*, 995 F.2d 145, 148 (9th Cir. 1993) (holding that a late filed complaint objecting to discharge may be allowed when a court explicitly misleads a party as to a deadline). Since equitable considerations cannot excuse a jurisdictional defect, these cases lend further support that Rule 4004(c) is not jurisdictional.

Although Kontrick argues that the bankruptcy court adopted the "minority" approach, this court disagrees. While the Seventh Circuit has not spoken on

this issue, the court finds the authority from the Second, Fourth, and Ninth Circuits persuasive and follows it. By not raising the timeliness of the family account claim in his responsive pleading, Kontrick waived the objection. Therefore, Kontrick waived his argument that the family account claim was untimely.

The Family Account Claim

Kontrick argues that the bankruptcy court's grant of summary judgment to Ryan on the family account claim in Count I was erroneous. In order to deny a debtor a discharge under § 727(a)(2)(A) the objecting party must establish that: (1) the act complained of was done at a time subsequent to one year before the date of the filing of the petition; (2) the act was done with the actual intent to hinder, delay, or defraud a creditor; (3) the act was that of the debtor; and (4) the act consisted of transferring, removing, destroying or concealing of the debtor's property or permitting any of these acts to be done. *In re Agnew*, 818 F.2d 1284, 1287 (7th Cir. 1987). Further, "[i]n order to justify the refusal of discharge under a section 727(a)(2) transfer, it must be shown that there was an actual transfer of valuable property belonging to the debtor which reduced the assets available to creditor and which was made with fraudulent intent."' *Id*. at 1289, *citing*, *4 Collier on Bankruptcy*, para. 727.02[5] at 727-21 to -22 (15th ed. 1986).

The bankruptcy court acknowledged that Kontrick took his name off of the checking account in 1993, which was outside the one year statutory period, but stated that Kontrick has continued to deposit his paycheck into the account that still bears only his wife's name. The bankruptcy court did not consider this as a "continuing concealment" because the transfers continued into the year prior to the time he filed for bankruptcy. (Exh. 2, at 14.) The bankruptcy court found that "[i]t is undisputed, even admitted, by Kontrick that

his salary is being deposited into an account on which his wife is the sole signatory. Any money transferred to this account is fraudulently transferred to [Kontrick's wife] because at the time of the transfer she gave no consideration." *Id.* (citations omitted). The bankruptcy court found that this evidence established three of the four elements for denial of discharge, and the only remaining question was whether Kontrick had actual intent to hinder, delay or defraud a creditor. The court explained that "[g]enerally, the question of intent will prevent the granting of summary judgment. This case, however, is not the usual case . . . [because] the Debtor's intent is clear." *Id.*

The bankruptcy court relied primarily on testimony from Kontrick's deposition pursuant to the 1993 citation to discover assets where Kontrick "freely admitted he transferred the bank account to Carolyn to prevent his creditors from attaching the funds." *Id.* at 14-15. In that deposition, Kontrick was asked why he made changes to the way he handled his personal finances, including taking his name off of the checking account, and he testified that "what prompted this change was the ridiculous maneuvers that you and your client [Ryan] have put me through in order to collect money which you don't have coming to you." *Id.* at 15. Further, the court cited testimony where Kontrick stated that he changed his finances because "[y]ou can spend your whole life working and then have some client who - some person out there who feels that he is entitled to your money because of some perceived wrong that they claim you have done, and they are then in a position to basically rob you of your life savings." *Id.* He further stated that "there are just thousands and thousands of thieves out there that are ready to come after you on any pretense and rob you of whatever belongings you might have. So, I felt that this was a way of protecting myself." Last, the bankruptcy

court cited testimony where Kontrick stated that "I felt that to have any sort of assets that could possibly be taken away from me would be foolish. So I basically divested myself of everything. In general, I have made an effort to not have any assets in my name." *Id.* Based on all of this testimony, the bankruptcy court found that "[Kontrick's] course of conduct coupled with his testimony proves beyond question that he intended to hinder, delay, or defraud at least Ryan and there can be no doubt that Kontrick, among his other acts, changed his finances and transferred the funds to his wife's account to hinder and delay, and prevent his creditor, Ryan, from collecting his judgment." *Id.* at 16. Thus, the bankruptcy court concluded that Kontrick's discharge must be denied pursuant to § 727(a)(2).

In its opinion on the motion for reconsideration, the bankruptcy court again stated that " [t]here can be no question that the Debtor acted in a manner which violated the statute. . . . Although he may have had the means to pay Ryan, he chose to take his name off of the account and began to pay his earnings into an account over which he had no control." (Exh. 11, at 8.)

The bankruptcy court's grant of summary judgment is a conclusion of law subject to *de novo* review. *In re Jones*, 226 F.3d 917, 920 (7th Cir. 2000). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56 (c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "The standard governing summary judgment is clear: '[I]f no rational jury could, on the evidence presented in the summary judgment proceeding, bring in a verdict for the party opposing summary judgment . . . then summary judgment must

be granted.'" *Oates v. Discovery Zone*, 116 F.3d 1161, 1175 (7th Cir. 1997) (citing *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 660 (7th Cir. 1991)).

It is well-recognized that "'exceptions to discharge are to be constructed strictly against a creditor and liberally in favor of the debtor.'" *Goldberg Securities, Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 524 (7th Cir. 1992) (quoting *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985)). Denial of discharge under § 727(a)(2)(a) requires proof of actual intent to hinder, delay, or defraud a creditor. *In re Smiley*, 864 F.2d 562, 566 (7th Cir. 1989). In determining whether a debtor has acted with intent to defraud, courts should consider the debtor's whole pattern of conduct, and actual fraudulent intent can be inferred from extrinsic evidence. *Id*.

First, Kontrick asserts that under Seventh Circuit law only a transfer that reduces the assets available to creditors will bar discharge, and that here the bankruptcy court's opinion does not refer to any specific deposits to the account that actually reduced assets available to Kontrick's creditors but instead merely stated that it was "axiomatic" that a transfer from a husband to a wife affects creditors because funds are no longer available. (Kontrick Brief, at 20.) Kontrick deposited his salary into an account that he could not access; there is no question that this transfer reduced the assets were available to his creditors.

Second, Kontrick argues that the bankruptcy court erred by finding an intent to hinder, delay, or defraud in the year before bankruptcy. Kontrick argues that he removed his name from the account in 1993, which was four years before he filed for bankruptcy, and that the citation to discover assets relied upon by the bankruptcy judge also occurred in 1993. He further argues that at the time he made those statements, he was solvent and was able to pay his debts.

It is undisputed that Kontrick took his name off of the account in 1993. After acknowledging that this fact that Kontrick took his name off of the account in 1993 alone is insufficient to bar discharge because it was outside the one year statutory period, the court noted that Kontrick continued to deposit his paycheck into the account which now bears solely his wife's name in the year right before he filed for bankruptcy. The court explained that "[b]ecause the transfers continued into the year prior to filing for bankruptcy, this court need not determine whether there is a continuing concealment." (Exh.2, at 13, fn. 19.) The court found that "[a]ny money transferred to this account is fraudulently transferred to Carolyn because at the time of the transfer she gave no consideration." After explaining that the question of intent typically prevents the granting of summary judgment, the bankruptcy court held that "[t]his case, however, is not the usual case [because] the Debtor's intent is clear." (Exh. 2 at 14.) The bankruptcy court relied on Kontrick's testimony at the citation to discover assets and his offer of a global settlement with his other creditors besides Ryan. Further, in its opinion denying reconsideration, the bankruptcy court explained that even without the offer of a global settlement, there was sufficient evidence to grant summary judgment.

Considering Kontrick's statements at the citation and his whole course of conduct, the bankruptcy court's finding that Kontrick's intent was clear was appropriate. Kontrick points to no evidence, sworn affidavits, or anything else providing an alternative explanation to why he removed his name from the checking account and continued to deposit his salary into an account that he did not have access to. Instead of paying his creditors, Kontrick purposely put his money where Ryan and his other creditors could not reach it -- and he testified to that under oath. Consider-

ing Kontrick's whole pattern of conduct, the bankruptcy court properly found that Kontrick had the intent to hinder, delay or defraud his creditors. *See In re Chavin*, 150 F.3d 726, 729 (7th Cir. 1998). The court has considered Kontrick's other arguments and finds that they lack merit.

The bankruptcy laws are intended to give a fresh start to the honest but unfortunate debtor. *See Peterson v. Scott (In re Scott)*, 172 F.3d 959, 966 (7th Cir. 1999), *citing Grogan v. Garner (In re Garner)*, 498 U.S. 279, 286-87, 111 S. Ct. 654 (1991). Discharge is a privilege, not a right, and the bankruptcy court properly denied it here.

CONCLUSION

For the foregoing reasons, the bankruptcy court's grant of summary judgment on Count I is affirmed.

IT IS SO ORDERED.

_____

Harry D. Leinenweber, Judge
United States District Court

Date: _____

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOISEASTERN DIVISION

In re:	)	Chapter 7
	)	
Andrew J. Kontrick, M.D.,	)	No. 97 B 10353
	)	
Debtor	)	Honorable
	)	John D. Schwartz
	)	
	)	
Robert A. Ryan, M.D.,	)	
	)	
Plaintiff,	)	
	)	Adversary No. 98 A 113
v.	)	
	)	
Andrew J. Kontrick, M.D.,	)	
	)	
Defendant.	)	

AMENDED MEMORANDUM OPINION

There are two matters presently before the court. The first is Dr. Robert Ryan's ("Ryan") Motion for Summary Judgment seeking to bar Dr. Andrew Kontrick ("Kontrick") from receiving his discharge pursuant to §§ 727 (a)(2), (3), (4) and (5).[5] Second is Kontrick's Motion to Strike portions of Ryan's 402(M) statement and certain of the attached exhibits.

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[1] Unless otherwise stated, an statutory references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101 - 1330. Ryan's adversary complaint also sought to determine the dischargeability of certain debts pursuant to § 523. Those counts are being held in abeyance until the § 727 issues are determined.

On April 4, 1997, Kontrick filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code ("Code"). On January 13, 1998, Ryan filed his original adversary complaint with this court. The complaint consisted of seven counts, four seeking to deny Kontrick his discharge pursuant to § 727 (a)(2), (3), (4), and (5).[6] The latter three counts of the complaint sought a finding that Kontrick's debt to Ryan was nondischargeable pursuant to § 523 (a)(2), (4), and (6).[7] On February 12, 1998, Kontrick answered the complaint. On May 4, 1998, Ryan sought and was granted leave to file his amended complaint and on May 6, 1998, he did so. The amended complaint sought the same relief as the original complaint and contained the same seven counts as the original complaint. The two complaints differed only in certain factual allegations. On June 10, 1998, Kontrick answered the amended complaint.

After reviewing the briefs and exhibits filed with the court, case law, and the Federal Rules of Evidence (hereinafter "Fed. R. Evid."), the Motion for Summary Judgment is granted as to the §727(a)(2) count (Count I) and denied as to the remainder, and the Motion to Strike is granted in part and denied in part.

BACKGROUND[8]

Ryan, prior to his affiliation with Kontrick, had established a private plastic surgery practice. In 1985[9]

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[2] Count I is pursuant to § 727(a)(2), Count II is pursuant to § 727(a)(3), Count III is pursuant to § 727(a)(4), and Count IV is pursuant to § 727(a)(5).

[3] Count V is pursuant to § 523(a)(2), Count VI is pursuant to § 523(a)(4), and Count VII is pursuant to § 523(a)(6).

[4] The facts as recited were taken from Ryan's 402(M) statement. Because the Motion to Strike will be denied in part, the facts which were not struck or denied are deemed admitted and form the factual basis for the Motion for Summary Judgment.

Ryan hired Kontrick to join the practice as an employee. As time progressed, Ryan offered Kontrick an ownership share in the practice. Kontrick at first refused, but in 1989 he joined Ryan as a 50% shareholder. Setting forth the terms of their relationship were a stockholders' agreement, an employment agreement, and a compensation agreement, all of which functioned as one contract.[10] Ryan alleged that Kontrick breached each of the forgoing agreements and submitted his claims to arbitration in December of 1991. The arbitration was commenced in January of 1992 ("First Arbitration").

The First Arbitration resulted in an award to Ryan of $47,157.81 plus interest and attorneys' fees. Kontrick sought to modify the award, but in 1993 it was affirmed. In April 1993, Ryan offered to settle the First Arbitration, the October 1992 arbitration[11] ("Second Arbitration"), and other pending litigation between Ryan and Kontrick for $96,501.65.[12] The offer was rejected by Kontrick. In July of 1993 Kontrick paid Ryan $58,915.32 and in September of 1993 Kontrick paid Ryan $6,346, both in satisfaction of the First Arbitration award and attendant fees and costs. See Appendix to Statement of Facts in Opposition to Motion for Partial Summary

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[5] In Kontrick's memorandum in opposition to summary judgment e asserts that he worked with Ryan beginning in 1983. For this court's purposes, the discrepancy is irrelevant.

[6] Statement of Material Undisputed Facts in Support of Motion of Robert A. Ryan for Summary Judgment, ¶16 at 4.

[7] This will be discussed further in the following paragraph.

[8] Kontrick and Ryan are involved in additional litigation in Lake County, Illinois. The case is captioned Plastic and Cosmetic Surgery Associates, S.C. v. Andrew Kontrick, and is case number 91 CH 907.

Judgment and In Support of Cross Motion for Summary Judgment, ("Appendix") Exhibit C.[13]

The Second Arbitration proceeding against Ryan was commenced in October 1992.[14] In May of 1995, the arbitrator entered a net award for Ryan in the amount of $519,324.42 comprised of awards for compensatory damages for failure to pay rent, compensatory damages for breach of fiduciary duty, compensatory damages for breach of the three agreements setting forth each parties respective positions as shareholders, a credit to Kontrick for a division of income and for severance, punitive damages, costs and expenses, and attorneys' fees. Kontrick filed an affidavit with the Circuit Court of Cook County attesting to the fact that if the arbitration award were to "become a judgment" he would not have enough assets to satisfy the judgment and would be required to file for bankruptcy protection. Plaintiff's 402(M) Statement Exhibit 5. The arbitration award became final and Kontrick appealed the award to the Appellate Court of Illinois, First District. The Appellate Court affirmed in part, reversed in part, and remanded the cause to the Circuit Court for a determination of the proper amount due Ryan. The Appellate Court determined that Ryan should not have been awarded punitive damages, upheld the award of attorneys' fees, and reduced the prejudgment interest rate to 9% as imposed by state statute as opposed to the contract rate that was awarded by the arbitrator. The parties have

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[9] The court is holding the cross-motion for summary judgment in abeyance until the present motion for summary judgment is determined.

[10] Again, the amended complaint and 402(M) Statement conflict. The amended complaint states that Ryan initiated the Second Arbitration, but the 402(M) Statement states that the Debtor [Kontrick] initiated the Second Arbitration.

not supplied this court with a final determination of the total amount due.

In response to the First Arbitration award, and prior to its satisfaction, Ryan served Kontrick with a citation to discover assets. Much of the underlying behavior and activity complained of was initially discovered during this citation to discover assets. It is also many of these allegations that Kontrick is seeking to strike as being untimely because they were not included in the amended complaint.

Ryan, in his 402(M) statement, quotes liberally from the transcripts of the hearing on the citation to discover assets. During this examination Kontrick made certain statements regarding his personal finances. The statements were, in no uncertain terms, that Kontrick did everything he could think of to divest himself of any assets which any creditor, including Ryan, could recover to satisfy any judgment. Specifically Kontrick admitted to taking his name off the joint checking account shared with his wife, transferring his Lake Forest home into tenancy by the entireties, transferring his half interest in a condominium located into Gurnee to his wife, and transferring title of a car to his daughter. See Plaintiff's 402(M) Statement Exhibit 7.

In his 402(M) statement Ryan sets forth 12 transfers which he contends support the denial of Kontrick's discharge pursuant to § 727(a)(2).[15] The 12 transfers are set forth as follows: 1) the transfer of the Lake Forest House, 2) the Lake Forest home furnishings, 3) Gurnee Condominium, 4) Transfers to children, 5) Design Studio, 6) transfers of checks to Carolyn Kontrick totaling $811,239.17 and "I took my name off the checking

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[11] Ryan's § 727(a)(2) claims is set forth in Count I of the amended complaint.

account for one and only one reason", 7) transfers from the Debtor's payroll registers, 8) transfer of salary checks to Carolyn Kontrick on a year by year basis, 9) transfer of $18,408.22 to Carolyn Kontrick as salary for 1995, 10) transfer of $5,000 in bonus money to Carolyn Kontrick in 1997, 11) transfers to debtor's daughter, Marie, and 12) transfers to retirement plan. See Plaintiff's 402(M) Statement of Material Undisputed Facts in Support of Motion of Robert A. Ryan for Summary Judgment. These transfers can be categorized into two basic groups, actions which Kontrick took to shield his income and assets from Ryan and Kontrick spending money in ways that Ryan deems inappropriate. The specific instances and facts are not germane except to say that Kontrick transferred an extensive amount of property away from himself and to his wife and children.

Kontrick also started to pay his creditors with cash, cashier's checks, or money orders. This was to prevent any of his suppliers or employees or others to whom he paid money from presenting a check which would be dishonored. It also, according to Kontrick, prevented the money from being recaptured by his bankruptcy estate should he file for bankruptcy protection. See Plaintiff's 402(M) Statement Exhibit 111 at 16.

Ryan also sets forth 8 false oaths which he alleges can sustain a denial of discharge under § 727(a)(4).[16] They are as follows: (1) Carolyn Kontrick began working for the corporation in the summer of 1995, (2) Carolyn's 1995 W-2 is accurate, (3) no money available to put into retirement plan in 1995, (4) the debtor stated that the only reason for putting his salary checks into Carolyn's name was that he had no check-

[12] Ryan's § 727(a)(4) claims is set forth in Count III of the amended complaint.

ing account, (5) the debtor said that he was not concerned about creditors when he transferred the Gurnee condominium, (6) the bathroom renovation was done because of a leaky shower causing water damage, (7) the debtor stated that other than the transactions outlined in the Voelz letter there were no other checks written to the retirement plan, and (8) the debtor stated that he made third party payment on the advice of his accountant. See Plaintiff s 402(M) Statement of Material Undisputed Facts in Support of Motion of Robert A. Ryan for Summary Judgment.

Ryan also proffers 10 reasons why Kontrick should be denied his discharge pursuant to § 727(a)(3) for failure to properly keep records.[17] Each of the 10 is set forth as follows: (1) the caregiver, (2) credit cards, (3) failure to account for $60,000 of discrepancies in checks written within one year of filing bankruptcy, (4) failure to account for LFB&T (Lake Forest Bank & Trust) checks, (5) failure to produce checks, (6) failure to disclose the service corporation's year to date general ledger, (7) impossibility of balancing corporate monthly statements (statements of revenue collected and expenses paid), (8) failure to disclose inflows and outflows from retirement plan, (9) failure to obey a lawful order of the court regarding turning over the 1995 appointment book, the 1995 insurance forms and 1995 bills, and (10) failure to obey a lawful order of the court and raising the cost of litigation by not disclosing that the 1992 appointment book was "lost." See Plaintiff's 402(M) Statement of Material Undisputed Facts in Support of Motion of Robert A. Ryan for Summary Judgment.

[13] Ryan's § 727(a)(3) claims is set forth in Count II of the amended complaint.

Ryan also alleges that Kontrick should be denied his discharge pursuant to § 727(a)(5) for failure to provide an adequate explanation for the dissipation of his assets.[18] These are basically duplicative of other reasons Ryan asserts that Kontrick should be denied his discharge. The reasons propounded by Ryan are: (1) what happened to the checks paid to Lake Forest Bank and Trust, (2) what happened to the unsubstantiated payments to the credit card companies, and (3) what happened to the payments allegedly made to the caregiver for Dr. Kontrick's mother. See Plaintiff's 402(M) Statement of Material Undisputed Facts in Support of Motion of Robert A. Ryan for Summary Judgment.

DISCUSSION

Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.

Bleak House, Charles Dickens, Chapter 1

Motion to Strike

Kontrick seeks to strike portions of the Motion for Summary Judgment and appurtenant 402(M) statement because they could not properly be pled as part of a new or amended complaint. See Fed. R. Bank. P. 4004, 4007. He alleges that allowing Ryan to include these allegations in the 402(M) statement is tantamount to allowing Ryan additional bases for a determination of whether or not Kontrick should be denied his discharge. He also argues that Ryan has failed to provide a proper foundation for the documents and summaries he produced to the court. And, without the proper foundation, they are not admissible and must be struck. See generally Fed. R. Evid. 901. Kontrick also proffers a

[14] Ryan's § 727(a)(5) claims is set forth in Count IV of the amended complaint.

general objection that many of the documents are irrelevant and should be struck. Fed. R. Evid. 402.

Ryan argues that the allegations and document summaries are admissible and should not be stricken. He argues that he has established a proper foundation for the documents and summaries. He maintains that these summaries and documents are just summaries of documents which are themselves admissible. He also argues that Fed. R. Evid. 1006 permits and encourages summaries to be produced to the court. Lastly, Ryan argues that the summaries and allegations in the 402(M) statements are relevant. See Fed. R. Evid. 401.

Fed. R. Evid. 401 states: "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Under this lenient standard, most of the paragraphs and exhibits which Kontrick is seeking to strike from Ryan's 402(M) statement are relevant. Nor is the evidence precluded by Fed. R. Evid 403. Although Kontrick disputes the veracity of the documents and summaries, these objections do not rise do the level where the probative value is substantially outweighed by unfair prejudice, confusion, or misleading the jury, or by undue delay, waste of time, or cumulative evidence. Fed. R. Evid. 403.

The additional allegations not included in the amended complaint cannot be admitted as additional counts or reasons for denying Kontrick his discharge because they were not timely filed. See Fed. R. Bankr. P. 4004; Shanahan v. City of Chicago, 82 F.3d 776 (7th Cir. 1996)(stating plaintiff may not amend his complaint through arguments in brief in opposition to motion for summary judgment); Toth v. Ham (In re Ham), 174 B.R. 104 (Bankr. S.D. Ill. 1994) (finding that un-

timely amendments to a complaint are prohibited); Flexi-Van Leasing, Inc. v. Perez (In re Perez), 173 B.R. 284 (Bankr. E.D.N.Y. 1994) (stating that time limitations under Rule 4004(a) are strictly construed.) To that extent, Kontrick is correct. However, the court will allow certain of the allegations pursuant to Fed. R. Evid. 404 as evidence of other acts to show intent, plan, or knowledge. Fed. R. Evid. 404(b). These acts go to show that is more likely than not that Kontrick acted with intent, a plan, or knowledge about the activities he was undertaking. However, this court will not explicitly discuss any grounds for the denial of Kontrick's discharge other than those set forth in the amended complaint.[19]

The court will, however, strike all material and exhibits which are not necessary as proof of the claims set forth in the amended complaint and which are not relevant to prove Kontrick's intent, plan, or knowledge.

The court will first review the false oath accusations. In Count III of the amended complaint, Ryan sets forth two allegations of false oaths which he feels should bar the debtor from receiving his discharge. These allegations are (1) that the Debtor stated Carolyn, his wife, started working for him in the summer of 1995 and (2) that there was no money to pay into the retire-

[15] It should be kept in mind that Ryan knew, or should have known, that many of the basis for his motion for summary judgment are specious. It is difficult to prove the requirements of the subsections of § 727 based solely upon pleadings and affidavits and Ryan's motion for summary judgment rests on allegations many of which require proof of intent. This is an example of how Ryan obfuscated the issues and literally became the "tail that wagged the dog." It should also be noted that Ryan's counsel apparently permitted him to take control of this case and compound and increase exponentially the workload for his attorney, Kontrick and his attorney, and this court.

ment plans in 1995. Ryan's 402(M) statement contains 6 additional allegations of false oaths which are set forth above. Each false oath is a distinct occurrence. The mere fact that Kontrick may have uttered a false oath on one occasion is not probative of whether or not he uttered a second false oath at a different time in regards to a distinct issue. The only thing that allowing additional evidence would do is to show that it is more likely than not that Kontrick is a liar, in other words, character evidence. Even if this were the case, it is not permissible evidence under Fed. R. Evid. 404. Although Fed. R. Evid. 404 permits character evidence to be used for purposes other than to show a person's character and actions in conformity therewith[20], in this case the court doubts the value of the alleged additional false oaths for any purpose other than that prohibited by Fed. R. Evid. 404. Therefore, all references to false oaths in the 402(M) statement that are not related to the two set forth in the amended complaint will be struck. Paragraphs 200 - 206 dealing with the false oath regarding Carolyn's W-2 will be struck from the 402(M) statement because this allegation was not included in the amended complaint. Paragraphs 214 - 234 will also be struck because none of the paragraphs reference an allegation contained in the amended complaint.

Ryan also alleges that Kontrick has failed to produce documents or has delayed in accounting for his income. Ryan first alleges that Kontrick has failed

[16] Federal Rule of Evidence 404 (b) reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . Fed. R. Evid. 404 (b)

to produce any records or otherwise properly account for payments made to his mother's caregiver. The amended complaint does not reference the caregiver. Accordingly, paragraphs 235 - 239 of the 402(M) statement will be struck. Paragraphs 252 - 285, pertaining to failure to produce or account will also be struck because they do not relate to any corresponding allegation in the amended complaint and are not probative of Kontrick's intent, plan, or knowledge.

Paragraphs 292 - 331 set forth a count under § 727(a)(6) to deny Kontrick his discharge. No § 727(a)(6) count was included in the amended complaint. These allegations related to what Ryan sees as discovery abuses. If Ryan was unhappy with Kontrick's responses, or lack thereof, to discovery he propounded, he should have brought the matter to the court's attention by means of a motion.[21]

The court will allow the document summaries. Fed. R. Evid. 1006 provides that evidence "may be presented in the form of a chart, summary, or calculation." Fed. R. Evid. 1006. It is axiomatic that to be admitted as evidence, the underlying documents must be admissible. Fed. R. Bankr. P. 7056; See United Phosphorus, Ltd. v. Angus Chemical Co., No 94 C 2078, 1996 WL 14036 (N.D. Ill. 1996) (stating that evidence supporting a motion for summary judgment must be admissible). As part of this showing, the person or party that prepared the documents must show that the appropriate steps were taken to ensure their accuracy and completeness. Ryan prepared, although not in a timely manner, an affidavit attesting to how he produced the

[17] On numerous occasions Ryan did just that, so there is no logical reason why he suddenly got shy and did not seek this court's intervention to resolve these issues. It is clear that they cannot stand to bar Kontrick's discharge because they cannot be properly added to the amended complaint at this late juncture.

summaries and that to the best of his knowledge they were accurate. This court struck his first affidavit because it contained settlement discussion information which should not have been brought to the court's attention.[22] The court accepts Ryan's amended affidavit and will review the summaries he prepared.

Motion for Summary Judgment

Summary judgment is governed by Federal Rule of Civil Procedure 56 made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056. Fed. R. Civ. P. 56; Fed. R. Bankr. P. 7056. Summary judgment can only be granted if there is no genuine issue of material fact. Matsushita Elect. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574,585 (1986). This showing requires more than a metaphysical doubt as to the material facts. Id. at 585. The evidence is not to be weighed, but only used to determine if a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). All inferences must be drawn in favor of the non-moving party. Matsushita, 475 U.S. at 587.

Section 727(a) of the bankruptcy code provides a debtor is entitled to a discharge unless certain enumerated exceptions exist. In re Juzwiak, 89 F.3d 424 (7th Cir. 1996). The exceptions to discharge are to be construed strictly against the creditor and liberally in favor of the debtor. Id. at 427. It is also important to remember that a discharge is a privilege not a right and should only benefit the honest debtor. Id. citing In re Frommann, 153 B.R. 113 (Bankr. E.D.N.Y. 1991).

[18] The court never reviewed the affidavit in question. It was reviewed by this court's law clerk and struck without being read by the court.

Section 727(a)(2), Count I

Section 727(a)(2) bars a debtor from receiving his or her discharge if he or she, "with intent to hinder, delay, or defraud a creditor has transferred, removed, destroyed, mutilated, or concealed property of the estate within one year prior to the filing of the petition." 11 U.S.C. § 727. A denial of discharge under this section requires proof of actual intent to hinder, delay, or defraud a creditor. Davis, Mannix & McGrath v. Fawell (In re Fawell), No. 98 A 01306, 1999 WL 569449 (Bankr. N.D. Ill. July 26, 1999) citing In re Snyder, 152 F.3d 596 (7th Cir. 1998). Intent should be determined by considering the debtor's "whole pattern of conduct" Id. at *5 quoting Bennett & Kahnweiler Assocs. v. Ratner (In re Ratner), 132 B.R. 728, 731 (N.D. Ill. 1991). Proof of harm is not required. Id. at *5.

Kontrick, on numerous occasions, admits to transferring assets from himself to his wife. He further admits transferring the property to protect himself from his creditors. See Plaintiff's 402(M) Statement Exhibit 109 at 33; see generally Plaintiff's 402(M) Statement Exhibit 111 at 4; Plaintiff's 402(M) Statement Exhibit 7. These transfers commenced prior to the year immediately proceeding the commencement of Kontrick's bankruptcy. However, many of these actions continued into the period within a year of his bankruptcy filing. In his amended complaint Ryan alleges numerous incidents which he argues require this court to deny Kontrick his discharge pursuant to § 727(a)(2). The court will address each of these in turn.

First, Ryan seeks to bar Kontrick his discharge because he took his name off of the family bank account yet deposited his employment income to that account. Ryan alleges that this is a fraudulent transfer and Kontrick should not receive his discharge because of it. It should be noted that Kontrick took his name off

of the account in 1993. This standing alone cannot bar his discharge because it occurred outside the 1 year statutory period. 11 U.S.C. § 727. However, Kontrick has continued to deposit his paycheck into the account which now bears solely Carolyn's name.[23] This provides a basis for the court's determination that Kontrick will be denied his discharge pursuant to § 727(a)(2). It is undisputed, even admitted, by Kontrick that his salary is being deposited into an account on which his wife is the sole signatory.[24] Plaintiff's 402(M) Statement Exhibit 17 - 18. Any money transferred to this account is fraudulently transferred to Carolyn because at the time of the transfer she gave no consideration. This meets three of the four parts required for a determination that a debtor should be denied his or her discharge pursuant to § 727(a)(2). See Feldman v. Welch (In re Welch), Nos. 096-71550-511, 096-7279-346, 1998 WL 249175 (Bankr. E.D.N.Y. April 23, 1998) (Determining § 727(a)(2)(A) requires a four part test for determining whether a debtor should be denied his or her discharge).

The sole remaining question is Kontrick's intent. Generally, the question of intent will prevent the granting of summary judgment. This case, however, is not the usual case. Unlike the Ratner case, here the Debtor's intent is clear. Kontrick, during the deposition pursuant to the citation to discover assets, freely admitted he transferred the bank account to Carolyn to prevent his creditors from attaching the funds. Plaintiff's 402(M) Statement Exhibit 17 - 18; see In re Welch, 1998 WL 249175 at *3 (Determining that debtor's removal of

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[19] Because the transfers continued into the year prior to filing for bankruptcy, this court need not determine whether there is a continuing concealment.

[20] His wife, Carolyn, is not a debtor in the above captioned case.

his name from a bank account to prevent creditors from attaching the account could support a finding that the debtor be denied his discharge). When asked why he made changes to the way he handled his personal finances, including taking his name off of the account, Kontrick answered "what prompted this change was the ridiculous maneuvers that you and your client [Ryan] have put me through in order to collect money which you don't have coming to you." Plaintiff's 402(M) Exhibit 7 at 9. Kontrick also admitted that he changed the way he handled his personal finances because of Ryan's attempt to collect his award from the First Arbitration. Plaintiff's 402(M) Exhibit 7 at 9.

Kontrick stated another reason he changed his finances was "[y]ou can spend your whole life working and then have some client who - some person out there who feels that he is entitled to your money because of some perceived wrong that they claim you have done, and they are then in a position to basically rob you of your life savings." Plaintiff's 402(M) Statement Exhibit 7 at 13-14.

Also during the citation to discover assets Kontrick stated that "there are just thousands and thousands of thieves out there that are ready to come after you on any pretense and rob you of whatever belongings you might have. So, I felt that this was a way of protecting myself." Plaintiff's 402(M) Statement at 8.

Kontrick also stated during the citation hearing that "I felt that to have any sort of assets that could possibly be taken away from me would be foolish. So I basically divested myself of everything. In general, I have made an effort to not have assets in my name." Id. at 9.

Further evidence of Kontrick's intent to hinder, delay, or defraud his creditors, specifically Ryan, is that he offered a global settlement with his other creditors

in which he would waive his discharge as to all of his creditors other than Ryan. The settlement was proposed by the Trustee in the multiple count adversary complaint he brought seeking to deny Kontrick his discharge.[25] By Memorandum Opinion and Order, of September 1, 1998, this court denied the Trustee's and Kontrick's request to waive Kontrick's discharge as to all his creditors except Ryan, determining that the settlement was not in the best interest of Kontrick's creditors and contrary to the spirit of the Code.[26] There is no question that the aggregate effects of Kontrick's behavior, up to the commencement of this case, was to hinder, delay, or defraud his creditors. His course of conduct coupled with his testimony proves beyond question that he intended to hinder, delay or defraud at least Ryan and there can be no doubt that Kontrick, among his other acts, changed his finances and transferred the funds to his wife's account to hinder and delay, and prevent his creditor, Ryan, from collecting his judgment. Accordingly, his discharge must be denied pursuant to §727(a)(2), pled as Court I of the amended complaint.

Ryan alleges that Kontrick paid the mortgage and real estate taxes on a condominium located in Gurnee, Illinois at which his mother resided. In response, Kontrick admits making the transfers, but argues that he is the court appointed legal guardian for his mother. As such he is responsible for the costs associated with her support, including the mortgage and real estate taxes on the condominium. Because this is a motion for summary judgment, all inferences must be drawn in favor of the non-moving party. Matsushita, 475 U.S. at 587. Because Kontrick is required, as his mother's legal

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[21] Gierum v. Kontrick, Nos. 97 B 10353,98 A 112

[22] Gierum v. Kontrick, Nos. 97 B 10353, 98 A 112 (Bankr. N.D. Ill. Sept. 1, 1998).

guardian, to pay her living expenses, this court cannot determine that the transfers with respect to the condominium were made with the intent to defraud Ryan.

Ryan next argues that Kontrick made payments to his wife, Carolyn, in excess of the value of services she rendered to his personal corporation. Kontrick argues that these payments were the fair value for the services rendered and were not fraudulent. Ryan, of course, alleges that Kontrick paid Carolyn money in excess of the value of services she provided to the corporation to shield the money from his efforts to collect his judgment. This is closely tied to the allegations that Kontrick has failed to properly account for his wife's salary and has not provided the relevant and appropriate documents to Ryan. These two allegations are necessarily mutually exclusive and because this court is unsure whether it has complete information it cannot determine whether there is a material question of fact. Even if the court does have all the relevant information this is purely a factual matter and is not appropriate for a determination on summary judgment on what is before the court.

Ryan's next argument is that Kontrick remodeled the bathroom in his home with certain luxury items and that this defrauded Ryan. Kontrick argues that the remodeling of the bathroom was a necessity because it was leaking into the basement. He further contends that even though pipes to later retrofit a steam generator were included in the remodeling, this was neither unusual for the area nor an excessive expense. Whether or not the remodeling was required and whether it was required to be undertaken in the manner that Kontrick pursued is a question of fact not appropriate for summary judgment.

Ryan's next allegation is that Kontrick made payments to his children in amounts not less that

$12,000. Kontrick first argues that any transfers made outside the one year period cannot be the basis to deny his discharge. He is correct. 11 U.S.C. § 727. He next argues that the transfers were made to help support his children. With respect to any transfers that fall within the year prior to the bankruptcy filing, this court is unable to determine Kontrick's intent. It is perfectly legitimate to provide funds to help support children. Without further proof, this court cannot grant summary judgment and deny Kontrick his discharge on this basis.

Ryan next attacks Kontrick's payments to his retirement plan. He alleges that certain payments were made to the retirement plan instead of him, a judgment creditor. Kontrick, in a cursory manner in his 402(N) statement, states that these transfers have already been explained and are proper. It is not this court's job to scour the record looking for evidence which will help exonerate Kontrick. Little v. Cox's Supermarkets, 71 F.3d 637 (7th Cir. 1995). However, although Kontrick may have contributed funds to his retirement account, and by doing that he may have defrauded his creditors or, at best, preferred himself over his creditors, the question of intent is still relevant. If Kontrick did not act with the requisite intent, this court cannot deny his discharge. The court cannot make a clear determination of Kontrick's intent on this issue from the record. There is the also the additional question as to when the transfers occurred. Any transfers that occurred prior to the year immediately preceding the bankruptcy filing cannot be the basis to deny Kontrick his discharge under § 727(a)(2). 11 U.S.C. § 727(a)(2). Accordingly, summary judgment is not appropriate.

Ryan also contends that Kontrick's payment of credit card bills in the amount of $49,805 was a fraudulent transfer. However, there is no corresponding alle-

gation in Ryan's 402(M) statement and it is therefore not before the court at this time.

Section 727(a)(3), Count II

Section 727(a)(3) bars a debtor from receiving his or her discharge if he or she

> has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

11 U.S.C. § 727(a)(3). The original burden of proof is on the plaintiff who must show that the debtor failed to maintain and preserve records and that such failure makes it impossible to determine the debtor's financial position. Lansdowne v. Cox (In re Cox), 41 F.3d 1294 (9th Cir. 1994). There is no requirement that the records be kept in a specific manner nor is there a rigid "standard of perfection in record-keeping mandated by § 727(a)(3)." In re Juzwiak, 89 F.3d at 429. However, it is not the responsibility of the trustee or creditors to sort through documents and reconstruct the debtor's assets. Peterson v. Scott (In re Scott), 172 F.3d 959, 969-70 (7th Cir. 1999). If Ryan can prove Kontrick's records are absent or inadequate, the burden of proof shifts to the Debtor and Kontrick must therefore justify the absence or inadequacy of the records. In re Cox, 41 F.3d at 1295.

The Seventh Circuit has also determined that there need be no proof of criminal conduct. There is no intent requirement under § 727(a)(3). In re Scott, 172 F.3d at 969. Where a debtor fails to maintain books or records from which his or her financial position can be

assessed, the debtor's discharge must be denied. Id. at 970.

Ryan would have this court believe that Kontrick has destroyed records or failed to properly keep records. Although Ryan proffered numerous exhibits and document summaries to support his position, the allegations were refuted by Kontrick's accountant. Kontrick's accountant attempts to explain away many of the apparent inconsistencies that Ryan "discovered." Many of these explanations revolve around the fact that he is able to reconcile the books because of various accounting methodologies and practices. See Affidavit of Dennis Voelz attached as Exhibit G to Defendant's Appendix to Statement of Facts in Opposition to Motion for Partial Summary Judgment. However, "it is well established in this Circuit that 'self-serving affidavits without factual support in the record will not defeat a motion for summary judgment.'" Patterson v. Chicago Assoc. for Retarded Citizens, 150 F.3d 719, 724 (7th Cir. 1998) quoting Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1295 (7th Cir. 1993)(citations omitted). Accordingly, Voelz's affidavit standing alone is not sufficient to withstand summary judgment.

Reviewing the voluminous documents supplied by Ryan, this court finds many of them to be confusing and replete with speculation. For example in reviewing Plaintiff's 402(M) Statement Exhibit 16, Ryan alleges that when Kontrick withdrew cash from the bank account either with a certified check, money order, or at an ATM machine, it was used to pay either personal or professional creditors. Although it is likely that he paid creditors in the sense that he paid someone for goods or services, Ryan has not proven this, it is mere speculation. Additionally, Ryan has made a determination, without offering supporting proof, how Kontrick spent the money. This court is not required to assist either

party prove its case and cannot give mere speculation any weight in reviewing a motion for summary judgment. Further, many of the documents submitted by Ryan contain illegible handwritten notations and markings which obscure the underlying information. Because in determining whether to grant a motion for summary judgment a court is bound to draw all inferences in favor of the non-moving party, summary judgment cannot be granted because on the record before the court, the court cannot determine whether the documents were properly kept or whether Kontrick did not produce them. There is therefore a question of material fact. Matsushita, 475 U.S. at 587.

Ryan further alleges that Kontrick has not been forthcoming in producing documents and has been delaying the production of certain documents that were requested. Kontrick argues that he has not refused to produce documents and that he has not intentionally delayed the production of any documents. Kontrick argues that he has given Ryan carte blanche to review his records and has cooperated to the fullest extent possible. Again, these are factual matters which cannot be determined from pleadings and 402(M) and (N) statements, this court will not grant summary judgment against Kontrick under §727(a)(3) which is Count II of the amended complaint.

Section 727(a)(4), Count III

> Section 727(a)(4) provides that a debtor shall not be granted a discharge if
>
> the debtor knowingly and fraudulently, in or in connection with the case -
>
> (A) made a false oath or account;
>
> (B) presented or used a false claim;

> (C) gave, offered, received, or attempted to obtain money, property or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
>
> (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

11 U.S.C. § 727(a)(4).

For Ryan to prevail on his § 727(a)(4) count, he must prove that (1) Kontrick made a statement under oath; (2) the statement was false; (3) Kontrick knew the statement was false; (4) Kontrick made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy. Bensenville Community Center Union v. Bailey (In re Bailey), 147 B.R. 157 (Bankr. N.D. Ill. 1992).

Ryan first alleges that Carolyn began working in Kontrick's office in 1996, but that Kontrick states she started working in 1995. The discrepancy appears to revolve around Carolyn's position. Kontrick states she worked in 1995, Ryan alleges she did not become office manager until February 1996. These are not necessarily mutually exclusive. Therefore, this factual question is not ripe for summary judgment.[27]

Ryan next attacks Kontrick's statement that there was no money available to pay into the retirement plan in 1995. He asserts that Kontrick made payments to the retirement plan during 1995. As support, Ryan proffers

---

[23] There is also a factual question because although Ryan alleges Carolyn did not work for Kontrick until 1996, he uses her 1995 W-2 form as evidence of false oaths, the allegations of which have been struck from the 402(M) statement.

that payments made to Carolyn which were alleged to be salary were not included on her W-2 statement and were actually contributions to the retirement plan. Kontrick argues that he repaid loans to the fund and that the payments were made upon the instruction of his accountant. See Plaintiff's 402(M) Exhibit 37. He further argues that the payments were required to keep the retirement plan in good standing. See Appendix Exhibit G. He differentiates loan payments from contributions and argues that no payments were made to the plan during 1995.

Ryan provides summaries, charts, and canceled checks to support his allegations. However, with the exception of a few pieces of evidence, most are not relevant. Rather, the evidence shows that Voelz made some errors in accounting. The other evidence is for years other than 1995. For example, Ryan provides statements for the retirement account for 1993 and 1996. However, without 1995, the court cannot determine whether payments were made in 1995. Additionally, providing statements for 1994 and 1996 would allow this court to determine whether payments were made into the account by comparing the ending balance of 1994 with the beginning balance of 1996.[28] Somewhat disturbing to the court are two checks included as evidence by Ryan which show payments, by Kontrick, to the retirement plan on December 31, 1995. Plaintiff's 402(M) Exhibit 105. Ultimately, there is an underlying question which must be resolved. That question cannot be answered on a motion for summary judgment as it hinges on the language used by Ryan and Kontrick. The question is: were the two checks repayment of loans to the retirement plan or were they contributions?

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[24] Of course the arithmetic would be complicated by interest or dividend payments into the account.

Should there be a difference in this context? Although at best it may be semantics, the answer to the latter is yes. Unfortunately, as to the former, this is a question of fact which this court cannot determine on summary judgment, especially considering the errors pointed out by Ryan in the accounting prepared by Voelz. Plaintiff's 402(M) Exhibit 107.

Section 727(a)(5), Count IV

Lastly, Ryan is seeking to deny Kontrick his discharge pursuant to § 727(a)(5) for "failure to explain satisfactorily. . . any loss of assets or deficiency of assets to meet the debtor's liabilities." 11 U.S.C. § 727(a)(5). To prove his case, Ryan must provide evidence that Kontrick owned substantial and identifiable assets that are no longer available to his creditors. Bancflorida v. Depasquale, No 93 C 4488, 1993 WL 410152 (N.D. Ill. October 14, 1993). If Ryan can meet that burden, Kontrick is required to satisfactorily explain the loss. Davis, Mannix & McGrath v. Fawell (In re Fawell), Nos. 98 B 01274, 98 A 1306, 1999 WL 569449 (Bankr. N.D. Ill July 26, 1999). The explanation "'must consist of more than vague, indefinite, and uncorroborated assertions' by the Debtor." In re D' Agnese, 86 F.3d 732 (7th Cir. 1996) (citations omitted). Whether an explanation is satisfactory is left to the discretion of the court. In re Fawell, 1999 WL 56949 at *16.

The first allegation is that Kontrick has failed to properly explain the disposition of his income. This court is not sure that the disposition of income qualifies as "substantial and identifiable assets." 11 U.S.C. § 727(a)(5). If it does, however, the court is unable to grant summary judgment on this issue if it could not grant summary judgment on the issue of whether Kontrick has produced all the relevant documents pertaining to his financial situation. Without all the relevant documents the court is unable to determine whether or

not Kontrick can adequately explain the dissipation of assets, if a dissipation truly occurred. Because the court is not sure whether Kontrick has produced all the relevant documents (see the discussion on § 727 (a)(3) above) the court cannot grant summary judgment as to whether he dissipated assets.

The next allegation goes to the failure to produce documentation to substantiate an apparent $49,805 shortfall as determined by Ryan in an accounting he prepared. This is tied to the § 727 (a)(3) count based upon the failure to produce the records, and as such summary judgment will be denied.

CONCLUSION

Summary judgment will be granted on Count I of the adversary complaint and Kontrick's discharge will be denied pursuant to § 727(a)(2) for transferring or removing property with the intent to hinder, delay, or defraud his creditors. Counts II - VII of the adversary complaint will be dismissed.

The parties shall provide this court with the amount due Ryan on remand of the Second Arbitration, on or before March 21, so that judgment may be entered.

SANCTIONS

On its own motion, the court will set a hearing to determine what, if any, sanctions should be assessed against Ryan and his counsel for vexatiously multiplying the proceedings. See 11 U.S.C. § 105; In re Volpert, 110 F.3d 494 (7th Cir. 1997). In almost fifty years involvement in the legal profession, this court has seldom seen two parties with such animosity towards each other. Their dislike for each other is readily apparent even without the knowledge that they have had a physical altercation. At every turn Ryan and his counsel complicated these proceedings. From subpoenaing

Kontrick's mother's caregiver who speaks no English to improperly including settlement discussion in an affidavit produced to this court, Ryan and his counsel have sought and succeeded in multiplying these proceedings. This court is aware that Kontrick is not blameless in these matters. However, it is Ryan who was unbridled and thus exacerbated not only the whole of the proceedings, but in particular, the summary judgment motion with the myriad of documents to support the motion, much of which was doomed to failure. Such conduct cannot go unnoticed. The hearing will be set for March 21, 2000 at the hour of 2:00 p.m. The court will hear what evidence Ryan and Kontrick chose to present to the court on this matter only. Each party will be allowed one hour to present its side of this matter.

ENTERED:

_____

John D. Schwartz
United States Bankruptcy Judge

Date: March 8, 2000 n*unc pro tunc*
February 25, 2000

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

In re:	)	Chapter 7
	)	
Andrew J. Kontrick, M.D.,	)	No. 97 B 10353
	)	
Debtor	)	Honorable
	)	John D. Schwartz
	)	
	)	
Robert A. Ryan, M.D.,	)	
	)	
Plaintiff,	)	
	)	Adversary No. 98 A 113
v.	)	
	)	
Andrew J. Kontrick, M.D.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the court on the motion of Andrew J. Kontrick ("Debtor") to reconsider this court's memorandum opinion ("Opinion") granting summary judgment for the plaintiff, Robert A. Ryan ("Ryan") and denying the Debtor his discharge and for consideration of other outstanding motions.[29] The

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[1] This court entered its original Memorandum Opinion on February 25, 2000, but on March 8, 2000 amended the opinion to correct a factual error and entered the amended Memorandum Opinion *nunc pro tunc* February 25, 2000. For the purposes of the motion for reconsideration the opinions will be referred to solely as the "Opinion."

Debtor asserts seven reasons the court erred in finding for Ryan. Of the seven reasons, the last two are only peripherally related to the reconsideration of the denial of discharge set forth in the Opinion: the consideration of the same transfers in a related adversary[30], and the Debtor's cross motion for summary judgment and motions for sanctions. As can be expected, Ryan suggests that this court was correct in denying the Debtor his discharge and counters each of Kontrick's allegations of error by this court. After reviewing both parties' briefs and the relevant case law, the motion will be denied.

BACKGROUND

On February 25, 2000, this court entered its Opinion which stated that the court would grant summary judgment on Count I of the adversary complaint in favor of Ryan and deny the Debtor his discharge pursuant to § 727(a)(2).[31] The Opinion denied summary judgment on three additional counts which were also seeking to deny the Debtor his discharge. On March 7, 2000, the Debtor filed a Motion To Reconsider Memorandum Opinion and For Consideration of Outstanding Motions ("Motion"). On March 8, 2000, the court amended the February 25, 2000, memorandum opinion to correct a scrivener's error. The March 8, 2000, memorandum opinion was entered *nunc pro tunc* February 25, 2000. Through no fault of the parties, at no time did this court enter a final judgment order denying the Debtor his discharge.[32]

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[2] The Trustee in the Debtor's bankruptcy is seeking to recover as fraudulent transfers, some of the payments which Ryan is contending should be the basis for denying the Debtor his discharge.

[3] Unless otherwise stated, all statutory references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101 - 1330.

[4] It is abundantly clear what order would be entered.

DISCUSSION

This case is an unusual case because the court did not enter a final judgment order although it entered the Opinion which stated that the Debtor would be denied his discharge. Normally this would be accomplished by a final judgment order. For numerous procedural reasons, this court did not enter a final judgment order. However, because no final judgment order was issued a procedural quandary has arisen. Is the present Motion to be reviewed under Fed. R. Bankr. P. 9023 or 9024, or under a different standard?[33] In the Motion, the Debtor argues that a different standard should be used. In a footnote, he relies upon Acme Printing Ink Co., v. Menard, Inc., 891 F. Supp. 1289 (E.D. Wis. 1995) to assert that this court has the power and authority to review its order before the entry of a final judgment. However, Acme Printing deals with interlocutory orders. There are two problems with reliance on Acme Printing. The first is that no order was entered, neither an interlocutory order nor a final order. The second is that if an order had been entered it would have been a final order because it granted partial summary judgment and dismissed the remainder of the complaint. United States v. Hindenlang (In re Hindenlang), 164 F.3d 1029 (6th Cir. 1999)(bankruptcy court orders granting summary judgment are final orders). Therefore, the Debtor's reliance on the Acme Printing case is misplaced.

This leaves only Fed. R. Bankr. P. 9023 or 9024 under which the Debtor can obtain the relief he is seeking. Neither rule is entirely appropriate because no or-

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[5] Fed. R. Bank. P. 9023 makes Fed. R. Civ. P. 59 applicable to bankruptcy proceedings and Fed. R. Bankr. P. 9024 makes Fed. R. Civ. P. 60 applicable to bankruptcy proceedings, with some exceptions enumerated in the Rule.

der was entered, either an interlocutory order or a judgment order. However, motions for reconsideration are not codified in the federal rules of civil procedure, so perhaps all is not lost. McNeela v. United Airlines, Inc., No. 98 C 1433, 1999 WL 987096 (N.D. Ill. Oct. 28, 1999), Lakeside Feeders, Ltd. v. Chicago Meat Processors, Inc., 35 F. Supp. 2d 638 (N.D. Ill. 1999). One court feels that motions for reconsideration are based in common law and serve a very limited function: "'to correct manifest errors of law or fact or to present newly discovered evidence.'" Lakeside Feeders, Ltd., 35 F. Supp. 2d at 640 citing Caisse Nationale De Credit Agricole v. CBI Indus., Inc., 90 F.3d 1264, 1269 (7th Cir. 1996). And, "while it is true that any nonfinal decision or order is subject to revision at any time before the entry of judgment, Fed.R.Civ.P. 54(b), such revisions are discouraged. 'A court has the power to revisit prior decisions of its own ... in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice."'" Budgetel Inns, Inc. v. Micros Systems, Inc. 34 F. Supp. 2d 720 (E.D. Wis. 1999)(citations omitted). This language is analogous to the language courts use to analyze motions brought under Fed. R. Civ. P. 59 to amend judgments. See Fed. R. Civ. P. 59; Cosgrove v. Bartolotta, 150 F.3d 729 (7th Cir. 1998); Moro v. Shell Oil Co., 91 F.3d 872 (7th Cir. 1996). This court will therefore use the case law interpreting Fed. R. Civ. P. 59 and Fed. R. Bankr. P. 9023 in determining the Motion. See In re Investors Florida Aggressive Growth Fund, Ltd., 168 B.R. 760 (Bankr. N.D. Fla. 1994)(treating motion to reconsider as motion under Fed. R. Bankr. P. 9023); In re Village Craftsman, Inc., 160 B.R. 740 (Bankr. N.J. 1993)(same).

Again, Fed. R. Bank. P. 9023 will be applied only if the moving party can establish a manifest error of

law or fact or can present newly discovered evidence. Moro, 91 F.3d at 876. Rule 9023 cannot be used to advance arguments not previously made or to relitigate old matters or advance new legal theories. Custom Cartage, Inc. v. Motorola, Inc., No. 98 C 5182, 1999 WL 1080607 (N.D. Ill. Nov. 24, 1999); McNeela v. United Airlines, Inc., No. 98 C 1433, 1999 WL 987096 (N.D. Ill. Oct. 28, 1999); A.V. Reilly Int'l, Ltd. v. Rosenzweig (In re Rosenzweig), 239 B.R. 905 (Bankr. N.D. Ill. 1999). A motion to reconsider allows a court to correct its own errors without the rigors of the appeal process. Russell v. Delco Remy Division of General Motors Corp., 51 F.3d 746 (7th Cir. 1995). It should not be brought by a party who "simply disagrees" with the court's original decision. In re Rosenzweig, 239 B.R. at 908. "In general, 'litigants must fight an uphill battle in order to prevail on a motion for reconsideration.'" Budgetel Inns, Inc., 34 F. Supp. 2d at 722.

As stated, the Debtor proffers seven reasons that this court should reconsider its Opinion. Of those, the last two can be dismissed out of hand. Reason number six is that this court should simultaneously rule on this matter and a related case which involves the Debtor's wife. Both sets of facts are similar and are based upon the same transactions. However, this is no reason to reconsider the courts prior Opinion. It does not meet even one criterion for reconsideration. Reason number seven is that this court should consider the Debtor's cross motion for summary judgment and motions to sanctions concurrently with the underlying summary judgment motion. Again, neither of the Debtor's motions are related to the Opinion and do not meet any of the criteria for determining whether a court should reconsider its prior decision. However, the court will take a moment to discuss these. Both the cross motion for summary judgment and both motions for sanctions will be denied. The cross motion for summary judgment

will be denied as moot because the court granted summary judgment on one count of the complaint and dismissed the others. For the same reason, the motions for sanctions, which sought dismissal as the sanction, will be denied.[34] However, the court's motion for sanctions is still pending and will be ruled upon at a later date.

The court will next address the Debtor's argument that this court has no jurisdiction over the count of the complaint on which it based its grant of summary judgment. The Debtor seeks reconsideration because, in his opinion, this court relied upon an allegation not included in the original complaint and although included in the amended complaint, was not timely. He is arguing that this court has no jurisdiction to deny his discharge on this basis because it was not timely brought. Contrary to the Debtor's assertion, this court does not believe the limitations period of Fed. R. Bankr. P. 4004 is jurisdictional, but is more akin to a statute of limitations. European American Bank v. Benedict (In re Benedict) 90 F.3d 50 (2nd Cir. 1996); Dombroff v. Greene, (In re Dombroff) 192 B.R. 615 (S.D. N.Y. 1996)(collecting cases regarding issue of whether or not Fed. R. Bankr. P. 4004 is jurisdictional; holding that it is not) compare Federal Deposit Insurance Core. v. Kirsch (In re Kirsch) 65 B.R. 297 (Bankr. N.D. Ill. 1986)(holding time limits under Rule 4004 are jurisdictional). Because the requirements of Fed. R. Bankr. P. 4004 are similar to a statute of limitations which can be waived, the requirements of Rule 4004 can also be waived.

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[6] The two motions for sanctions sought dismissal of the adversary complaint. One motion was grounded in Fed. R. Bank. P. 9011 and the other in the court's equitable power under § 105.

The Debtor is specifically arguing about his transfer of funds to his wife in the year immediately proceeding his bankruptcy. He argues that the allegation could not have been included in the amended complaint because it was barred by Fed. R. Bankr. P. 4004. He proposes that this allegation should have been struck when the court struck other allegations in the 402 (M) Statement. In his Motion to Strike, he mentions that this allegation was not included in the original complaint, but was included in the amended complaint. However, he does not continue the argument to any logical conclusion. He never argued that the allegation was untimely or should be struck for any reason. Rather, in his 402 (N) Statement he responded to the very allegations that he is now contesting this court's jurisdiction over. See Defendant's 402 (N) Statement at 13. This court read very carefully the Motion to Strike, and as evidenced by the Opinion, did indeed strike many allegations. It is not the court's responsibility to make a party's arguments on their behalf. Little v. Cox's Supermarkets, 71 F.3d 637 (7th Cir. 1995) see generally Tyler v. Runyon, 70 F.3d 458 (7th Cir. 1995); Ehrhart v. Sec. of Health and Human Services, 969 F.2d 534 (7th Cir. 1992). The Debtor failed to argue that the allegations added to the amended complaint should be stricken, and accordingly, at this point it is an argument "that . . . should have been presented" prior to this point and a theory that the party had the ability to raise in the first instance. Moro, 91 F.3d at 876, citing LB Credit Corp. v. Resolution Trust Corp., 49 F.3d 1263, 1267 (7th Cir. 1995); Russell, 51 F.3d at 749. It is this court's opinion that the Debtor waived his right to contest the timeliness of the allegation by not doing so prior to this Motion. Accordingly, the Motion is denied on this basis. The purpose of a motion to reconsider is not to give the moving party another bite at the apple. In re Rosenzweig, 239 B.R. at 908.

The Debtor's next argument is that this court failed to consider how the transfers reduced the funds available to creditors. It is axiomatic that if one transfers funds from himself to his wife, his creditors are affected because those funds are no longer available for them. To argue that there was no diminution of assets for his creditors because his wife paid all the bills and other expenses with these funds is unavailing. In this court's opinion, the Debtor's wife paying the bills was not consideration for the transfers and the transfers removed money from the Debtor's control so that his creditors could not reach the funds.[35] But see Michelson v. Schor, No. 93 C 5124, 1996 U.S. Dist. Lexis 16928 (N.D. Ill. Nov. 14, 1996).

The Debtor's next argument is that the transfers were not acts that hindered, delayed, or defrauded his creditors within one year of bankruptcy. To bolster his claim, the Debtor provides this court with case law from courts both inside and outside of this circuit. (In re Miller, 39 F.3d 301 (11th Cir. 1997); Michelson v. Schor, No. 93 C 5124, 1996 U.S. Dist. Lexis 16928 (N.D. Ill. Nov. 15, 1996)). He argues that his case is similar to these cases and these cases show that he could not have acted with the requisite intent to hinder, delay, or defraud Ryan, because others in similar circumstances were found not to have acted with the requisite intent. Relying on these cases, the Debtor argues that he should be allowed his discharge. Although each of these cases may be similar, none contains the facts of this case. There can be no question that the Debtor acted in a manner which violated the statute. This case,

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[7] Interestingly, the Debtor argues that his wife had always paid the bills from the account in question. See Defendant's 402 (N) Statement at 13. The difference is that originally the Debtor was a signatory to the account and had control over the funds, whereas he later had no control over the account.

as evidenced by the animosity between the parties and the ancillary and correlated litigation, is unlike anything the Debtor has found in the case law presented to the court.

Further, the Debtor argues that his financial condition at the time of the citations is relevant, not his financial condition afterwards. He argues that he had the financial wherewithal to easily pay Ryan the money he was owed. However, instead of paying Ryan, the Debtor chose to shield his income and assets which began what has been a seemingly endless quest by Ryan to satisfy his judgment. The Debtor equates his ability to pay any judgment with his intent to pay any judgment. Although he may have had the means to pay Ryan, he chose to take his name off of the account and began to pay his earnings into an account over which he had no control.

The court took great pains to quote the Debtor's language in certain depositions taken after he removed his name from the account. This was not by accident. The Debtor's intent to hinder, delay, or defraud Ryan was very clear from his language. Now the Debtor wants to quibble over the timing of the statements. As the Debtor points out, it is his intent during the year prior to his bankruptcy which is vital, not his intent at the time of the citation hearings. There cannot be a question that the Debtor had the intent to hinder, delay, or defraud Ryan, both when the citations were taken and during the relevant statutory period.

The Debtor also argues that the proposed settlement with John Gierum, the Trustee of his Chapter 7 case ("Trustee") in which he would waive his discharge pursuant to § 727(a)(10) as to all of his creditors except Ryan, cannot be used as evidence of his intent to hinder, delay, or defraud Ryan. His logic is that it was an agreement between himself and the Trustee which was

negotiated at arm's length. This he argues, shows that it could not have been formulated with the requisite intent. This was not the only basis on which the court based it decision, and as such, giving the Debtor the benefit of the doubt, the court's opinion would not have been any different if it did not consider the proposed settlement.

The Debtor has failed to meet any of the criteria for reconsideration. Accordingly, the Motion is denied.

ENTERED:

Date: June 8, 2000

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John D. Schwartz
United States Bankruptcy Judge

(2)

No. 02-0819

Supreme Court, U.S.
FILED
MAR 24 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ANDREW J. KONTRICK,

Petitioner,

v.

ROBERT A. RYAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented is whether the 60-day period for objecting to a bankruptcy discharge contained in Bankruptcy Rule 4004(a) is a non-jurisdictional filing deadline subject to equitable defenses, including waiver.

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STATEMENT OF THE CASE

A. Facts Upon Which Bankruptcy Debtor's Discharge Denied

Respondent, Robert A. Ryan, M.D. ("Ryan"), and Petitioner, Andrew Kontrick, M.D. ("Kontrick"), both cosmetic and plastic surgeons, were equal shareholders in a professional corporation founded by Ryan. App. at 2. Soon after becoming a 50% shareholder, Kontrick breached the three agreements that set out the terms of their professional relationship and his fiduciary duty to Ryan. App. at 42. Two arbitration proceedings ensued between the doctors, the first of which resulted in an award to Ryan of $47,157.81 plus interest, expenses and attorneys' fees. App. at 2. Kontrick paid a total of $65,261.32 in satisfaction of this judgment. *Id.*

The second arbitration resulted in an award to Ryan of $519,324.42 including punitive damages, costs, expenses and attorneys' fees. *Id.* The Illinois Appellate Court later reversed the punitive damages award of $150,000, reduced the prejudgment interest rate to 9%, and affirmed the remainder of the award in the amount of $369,324.42 plus interest. *Ryan v. Kontrick*, 304 Ill. App. 3d 852, 710 N.E.2d 11 (1st Dist. 1999). Kontrick has never satisfied the judgment entered based on the second arbitration award.

Following the first arbitration, Ryan filed a citation to discover Kontrick's assets. App. at 2. During his deposition, Kontrick repeatedly admitted that he transferred assets to his wife to protect them from his creditors, specifically Ryan. App. at 52. For example, when Kontrick was asked about his personal finances, including the decision to remove his name from the family checking

account, he stated that the change was "prompted" by "the ridiculous maneuvers that you and your client [Ryan] have put me through in order to collect money which you don't have coming to you." App. at 34. He further explained that he changed his finances because "[y]ou can spend your whole life working and then have some client who – some person out there who feels that he is entitled to your money because of some perceived wrong that they claim you have done, and they are then in a position to basically rob you of your life savings." *Id.*

Elaborating on these admissions, Kontrick stated that "there are just thousands and thousands of thieves out there that are ready to come after you on any pretense and rob you of whatever belongings you might have. So, I felt that this was a way of protecting myself." *Id.* Kontrick further admitted the following: "I felt that to have any sort of assets that could possibly be taken away from me would be foolish. So I basically divested myself of everything. In general, I have made an effort to not have any assets in my name." App. at 35.

In April 1997, Kontrick filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code ("Bankruptcy Code"). App. at 3.

B. The Bankruptcy Court Found That Bankruptcy Rule 4004 Is A Filing Deadline Subject To Equitable Defenses

Ryan timely filed an adversary complaint with the bankruptcy court objecting to Kontrick's request for discharge, and he subsequently sought and obtained leave to file an amended complaint. App. at 3-4, 40. As was the case with the original adversary complaint, the amended

pleading sought to deny a bankruptcy discharge to Kontrick pursuant to 11 U.S.C. § 727(a)(2), (3), (4), and (5), as well as a determination that Kontrick's debt to Ryan was nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (4), and (6). *Id.*

The amended complaint's objection to discharge under § 727(a)(2)(A) asserted for the first time that Kontrick's practice of depositing his paychecks in the year before his bankruptcy in an account that had previously been a joint family account, but now was only in his wife's name, had been done with the intent to hinder, delay or defraud his creditors. App. at 27. Kontrick answered the amended complaint, failing to raise any objection in his pleading to the timeliness of this new factual basis for objecting to discharge under § 727(a)(2)(A). App. at 16, 40.

Ryan moved for summary judgment on all counts of his amended adversary complaint. App. at 4. The bankruptcy court granted Ryan's motion for summary judgment on the family account claim, finding that Kontrick's actions in depositing his paycheck in his wife's account in the year preceding his bankruptcy had been done with the intent to defraud, hinder or delay his creditors within the meaning of § 727(a)(2)(A). App. at 4-5. The bankruptcy court further found that Kontrick particularly intended to hinder, defraud or delay Ryan from collecting on the second judgment. App. at 54.

Kontrick filed a motion for reconsideration, asserting for the first time the affirmative defense that the family account claim upon which summary judgment had been granted should instead have been rejected because it was not timely filed pursuant to Rule 4004(a). App. at 5. The bankruptcy court denied the motion to reconsider, holding

that Kontrick had waived the Rule 4004(a) timeliness defense. *Id.*

C. The District Court Found That Bankruptcy Rule 4004 Is A Filing Deadline Subject To Equitable Defenses

On appeal to the District Court, Kontrick raised two arguments. App. at 27. First, he argued that Ryan's non-dischargeability claim based on Kontrick's deposits into his wife's checking account in the year preceding his bankruptcy was untimely because the amended complaint was filed after the time for objecting to discharge had expired under Rule 4004(a). App. at 27-28. Second, he argued that the deposits into his wife's account neither reduced the assets available to creditors nor was intended to hinder, delay or defraud his creditors. *Id.* The District Court rejected both arguments. App. at 6.

The District Court determined that, lacking a Seventh Circuit decision on point, it would follow the recent decisions of several other Circuit Courts recognizing that Rule 4004(a) is merely a filing deadline that may be waived if an objection is not made in a timely manner. App. at 32-33. Based on these decisions, the District Court found that Kontrick had waived the issue of the timeliness of the family account claim by failing to raise it in his responsive pleadings. App. at 33. The District Court also agreed with the bankruptcy court that Kontrick's deposition testimony conclusively established that he intended to defraud, hinder or delay Ryan in collecting the judgment, and thus affirmed the bankruptcy court's grant of summary judgment. App. at 37-38.

D. The Seventh Circuit Found That Bankruptcy Rule 4004 Is A Filing Deadline Subject To Equitable Defenses

The Seventh Circuit likewise rejected Kontrick's argument that Rule 4004(a) is not subject to equitable defenses. App. at 14. Based on its consideration of the policy concerns that animate Rule 4004(a), the Seventh Circuit found that the rule is a filing deadline subject to equitable defenses, rather than a jurisdictional limitation. App. at 10, 12. The Seventh Circuit also concluded that Kontrick waived his argument as to the timeliness of Ryan's amended complaint and that the bankruptcy court had properly granted summary judgment to Ryan and denied Kontrick's discharge under § 727(a)(2)(A). App. at 23.

REASONS FOR DENYING THE PETITION

A. No Split Of Authority Exists In The Circuit Courts Of Appeals Concerning Bankruptcy Rule 4004(a)

Contrary to Kontrick's claim, there is no split of authority among the Circuit Courts of Appeals on Rule 4004(a). In fact, the Circuit Courts that have considered the nature of the filing deadline in Rule 4004(a) have recognized that it is not jurisdictional. *Ryan v. Kontrick*, 295 F.3d 724 (7th Cir. 2002) (holding that Rule 4004 is not jurisdictional); *Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244 (4th Cir. 1994) (holding that Rule 4004 is not jurisdictional); *see also In re Moss*, 289 F.3d 540 (8th Cir. 2002) (recognizing that the courts have the equitable power to allow untimely objections to discharge under Rule 4004 if caused by the court's own error); *In re Themy*,

6 F.3d 688 (10th Cir. 1993) (recognizing that the courts have the equitable power to allow late-filed complaints objecting to discharge under Rules 4004 and 4007 when a court's action misleads a creditor as to the deadline); *In re Anwiler*, 958 F.2d 925 (9th Cir.), *cert. denied*, 506 U.S. 882 (1992) (holding that courts have the equitable power to allow untimely objections to discharge under Rules 4004 and 4007 if caused by the court's own error).[1]

Kontrick mistakenly references a "split" in authority by comparing cases that address Rule 4004 with those that address Bankruptcy Rule 4007, as if they were the same rule. However, as the District Court stated, "discharge and dischargeability are governed by distinct procedural rules. Rule 4004 sets out the procedure for granting or denying discharge under § 727. Rule 4007 governs the determination of dischargeability of a debt under § 523." App. at 30.

Only Rule 4004 is at issue in this case. The Seventh Circuit, while analogizing Rule 4004 to Rule 4007, did not need to determine whether or not Rule 4007 was subject to equitable defenses in deciding the case before it. If this Court were to believe that any split of authority concerning Rule 4007 needs to be resolved, another case that

[1] Kontrick's petition mistakenly suggests that the Eleventh Circuit held in *In re Coggin*, 30 F.3d 1443 (11th Cir. 1994), that the deadline in Rule 4004(a) is a "jurisdictional requirement." In fact, the Court in *Coggin* merely held that because the discharge complaint had been timely filed, the bankruptcy court retained the equitable power to modify its own interlocutory orders. Thus, the references in the opinion to a "jurisdictional bar" that would exist if the complaint had not been timely filed are *dicta*. No Circuit Court has held that the time limitation contained in Rule 4004(a) is jurisdictional.

actually involves Rule 4007 would seem to be a more appropriate vehicle for doing so. Because this case involves Rule 4004(a), about which there is no split of authority among the Circuit Courts, rather than Rule 4007(c), Ryan respectfully contends the petition for certiorari be denied.

B. A Majority Of The Circuit Courts Of Appeals Have Found Bankruptcy Rule 4007(c), Which Does Not Even Apply To This Case, Is A Filing Deadline Subject To Equitable Defenses

Even if this Court were to consider Rules 4004(a) and 4007(c) to be so analogous that a case decided under one rule should determine the nature of both, a majority of the Circuit Courts have recognized that Rule 4007(c) is not jurisdictional. Specifically, the Second, Sixth, Ninth and Tenth Circuits have recognized that the time limitation in Rule 4007(c) is not jurisdictional. *In re Benedict*, 90 F.3d 50 (2d Cir. 1996) (holding that Rule 4007 is not jurisdictional); *In re Isaacman*, 26 F.3d 629 (6th Cir. 1994) (recognizing that the courts have the equitable power to allow untimely objections to discharge under Rule 4007); *In re Kennerley*, 995 F.2d 145 (9th Cir. 1993) (holding that the courts have the equitable power to allow late-filed complaints objecting to discharge under Rule 4007 when the court misleads a party as to the deadline); *In re Anwiler*, 958 F.2d 925 (9th Cir.), *cert. denied*, 506 U.S. 882 (1992) (concluding that the courts have equitable power to allow late-filed complaints objecting to discharge under Rules 4004 and 4007 when a court's act misleads a creditor as to the deadline); *In re Themy*, 6 F.3d 688 (10th Cir. 1993) (same).

Only the Fifth and Eleventh Circuits, in earlier decisions, have found that Rule 4007 is jurisdictional and,

hence, not subject to waiver or other equitable defenses. *Neely v. Murchisen*, 815 F.2d 345 (5th Cir. 1987) (holding that Rule 4007 sets a fixed limitation period of sixty days); *In re Alton*, 837 F.2d 457 (11th Cir. 1988) (finding that Rule 4007 is mandatory and does not allow court any discretion to grant a late-filed motion for extension of time to file complaints objecting to discharge). These conflicting decisions by the Fifth and Eleventh Circuits were rendered fifteen or more years ago. Since that time, no Circuit Court has ruled that Rule 4007(c) is jurisdictional. As a result, these two aberrational decisions have effectively been rendered historical footnotes in light of the uniform reasoning and trend of the decisions in more recent years.

In light of these more recent decisions recognizing that Rule 4007(c) is not jurisdictional, it is reasonable to expect that the Fifth and Eleventh Circuits would reconsider or modify their earlier decisions concerning this rule. Evidence of such reconsideration can be seen in the Tenth Circuit, which held in *First Nat'l Bank v. Barnes*, 956 F.2d 277, unpublished disposition, 1992 WL 33251 (10th Cir. 1992), that Rule 4007(c) was jurisdictional, but then in a published decision decided the following year, *In re Themy*, 6 F.3d 688 (10th Cir. 1993), found that a court has the equitable power to allow a party to file a complaint after the filing deadline imposed by Rules 4004 or 4007 has run. Thus, it appears that the Tenth Circuit has modified its view on the jurisdictional nature of Rule 4007(c) and concluded that 4004(a) and 4007(c) are subject to equitable considerations and defenses – something that could not be the case if these statutory limitations were jurisdictional. *See, e.g., In re Benedict*, 90 F.3d at 54 (holding that equitable considerations cannot excuse a jurisdictional defect).

Kontrick attempts to use disagreements at the bankruptcy and district court levels regarding Rules 4004 and 4007 to bolster this supposed conflict between the Circuit Courts on Rule 4004. Disagreements at the bankruptcy and district court level are not a compelling reason for Supreme Court review. *Braxton v. United States*, 500 U.S. 344, 347 (1991) (principal purpose for certiorari jurisdiction is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law); *see generally* S. Ct. Rule 10. Indeed, such conflict is best handled by the Circuit Courts.

The Circuit Courts are clearly moving toward agreement on Rule 4007(c). Further percolation in the lower courts will likely lead to consensus on this issue. In fact, it is quite a stretch to argue that a conflict among the Circuit Courts exists concerning whether equitable defenses apply to a filing deadline in Rule 4004 where there is no conflict at all with respect to that rule, and there has been no conflict among the Circuit Courts that have ruled on this issue with respect to Rule 4007 during the last 15 years. As a result, the time does not seem ripe for review by this Court and Ryan respectfully requests that the petition for certiorari be denied.

C. The Seventh Circuit's Reasoning In The Decision Below That The Time Limit Provided In Rule 4004(a) Is A Filing Deadline Subject To Equitable Defenses Is Correct

The Seventh Circuit's reasoning that Rule 4004(a) is a filing deadline subject to equitable defenses is sound. It is in complete accord with the other Circuit Courts that have ruled on this issue, correctly reflecting the view that a rigid jurisdictional interpretation of Rule 4004(a) would be

both unjust and contrary to the policy considerations that underlie the Bankruptcy Code.

The Seventh Circuit properly started its analysis by recognizing the principle that "[s]tatutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling." *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985). App. at 7. The issue then became for the Seventh Circuit whether some basis existed for treating Rule 4004(a) as an exception to this general rule. *Id.*

The text of Rule 4004 fails to suggest that its time limitation is intended to be jurisdictional. App. at 8-9. Nor does the text of Bankruptcy Rule 9006(b)(3),[2] the rule that governs the enlargement of time for filing complaints under Rule 4004(a), suggest that the filing deadline is jurisdictional. *Id.* Although Rule 9006(b)(3) restricts the grounds upon which the bankruptcy court may enlarge time for actions under Rule 4004(a), it also grants the bankruptcy court discretion to allow extensions – discretion that is, by definition, anathema to rules that are jurisdictional in nature. App. at 9-11. The Seventh Circuit then examined the structure, legislative history and underlying policies of the bankruptcy rules. App. at 9.

The Circuit Court determined that the overall structure of the bankruptcy statute provides support for the view that Rule 4004 is not jurisdictional. App. at 12. For

[2] Bankruptcy Rule 9006(b)(3) provides: "The court may enlarge time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules."

example, no indication exists that timeliness is a prerequisite to a bankruptcy court's exercise of jurisdiction in a core proceeding such as Ryan's objection to discharge. App. at 13.

Next, the Seventh Circuit weighed the competing policies underlying the Bankruptcy Code. App. at 9-12. While the Court acknowledged the importance of ensuring that debtors are not harassed by creditors after their claims have been discharged in bankruptcy, it found that finality would in fact be at greater risk if the time limitation contained in Rule 4004(a) were jurisdictional. App. at 11-12. If it were jurisdictional, then even a final judgment would be subject to collateral attack, a result that would not serve the Bankruptcy Code's goal of promoting certainty and finality for debtors. *Id.* The Seventh Circuit determined that these goals would be better fostered not by a rigid jurisdictional approach to Rule 4004(a), but by allowing the bankruptcy courts to exercise their discretion. *Id.* Based on these considerations, the Seventh Circuit concluded that the timeliness provision in Rule 4004(a) is not jurisdictional. App. at 14.

The Seventh Circuit correctly decided that Rule 4004(a) is more akin to a filing deadline subject to equitable defenses than a jurisdictional deadline. For this reason, Ryan respectfully requests that the petition for certiorari be denied.

CONCLUSION

In sum, no split of authority exists among the Circuit Courts of Appeals on Rule 4004. As a result, this case is not the proper vehicle to resolve any conflict concerning

whether Rule 4007 is or is not jurisdictional. Even if Rule 4007 were in dispute, all of the most recent cases decided by the Circuit Courts are in agreement that it is a filing deadline subject to equitable defenses and considerations. Furthermore, the Seventh Circuit correctly decided that Rule 4004(a) is subject to waiver and other equitable defenses. For these reasons, Ryan respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

ANDREW J. KONTRICK,

Petitioner,

v.

ROBERT A. RYAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Petitioner Andrew Kontrick replies to the respondent Robert Ryan's brief in opposition.

INTRODUCTION

Respondent does not contend that there are fact issues here or that this case involves anything other than a pure question of law—whether the deadline for objecting to a bankruptcy discharge is jurisdictional. He also does not dispute that the issue is ripe and that if Rule 4004 is jurisdictional, then the decision of the court below must be reversed. Instead, respondent gives three reasons to deny the petition. None of them are convincing.

First, he argues that the case law involving what has been described as the "virtually identical" Rule 4007 may be disregarded because that rule is somehow different from Rule 4004. Yet after making that claim, he fails to show any difference between the two rules. Moreover, the Seventh Circuit below and other courts readily treat the Rules 4004 and 4007 as one and the same for the purpose of deciding the jurisdictional issue.

Respondent next contends that two decisions from the Fifth and Eleventh Circuit—which he acknowledges follow the jurisdictional view—have become "aberrations" and "historical footnotes." However, courts in the majority see it quite differently. These so-called "footnotes" continue to have a substantial following—even in the most recent decisions. Respondent also attempts to place decisions from the Sixth, Eighth, Ninth and Tenth Circuits in the non-jurisdictional camp. Yet, this is an attempt to hammer square pegs into round holes. As courts have already recognized, these decisions do not belong to the non-

jurisdictional line, but to a separate category of cases that permits a narrow equitable exception to deadlines under "unique" or "extraordinary circumstances"—such as when the court itself sets the wrong date. Thus, respondent fails to show that the division between the circuits has disappeared. The split between the circuits is real and continues to fuel the division among the district and bankruptcy courts.

Respondent's final reason to deny the petition is that the Seventh Circuit correctly decided the issue. In making this argument, respondent ignores the very analysis that courts have relied on to find that the deadlines are jurisdictional—this Court's decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). In *Taylor*, this Court rejected the policy arguments for an equitable exception to Rule 4003, in favor of a strict application of the time limits set by that rule. In sum, respondent presents no sound reason to deny the petition. This case presents the Court with a deep and continuing division of authority among courts at all levels that has created widespread confusion in an area that is fundamental to bankruptcy law. This Court in its supervisory role over federal rules should intervene to end that confusion.

ARGUMENT

A. Rules 4004 and 4007 Are Virtually Identical—Indeed the Seventh Circuit Itself Treated Them As One and the Same Here

Respondent's first argument to deny the petition is that Rule 4007 should be considered separately from Rule 4004. Resp. Br. at 5-7. Yet having made such a claim, respondent does not even attempt to show that there is any real difference between the two rules for the purpose of the jurisdictional issue. In fact, as courts have recognized, the rules are "almost identical." Both

rules contain the identical language that an objection to a general discharge (Rule 4004(a)) and discharge of a particular debt (Rule 4007(c)) "shall be filed no later than 60 days after the first date set for the meeting of creditors." Both rules also use the same language that any motion to enlarge the time must be "filed before the time has expired." *See* Rules 4004(b) and 4007(c). Both rules are also part of a limited number of rules (along with Rule 4003) listed in Rule 9006(b)(3) that may be enlarged "only to the extent and under the conditions stated in those rules."

As such, the two rules are interchangeable for the purpose of deciding the jurisdictional issue and courts readily treat them that way. The Seventh Circuit itself recognized this: "[b]ecause the rules are almost identical, it is appropriate to consider decisions by courts construing Rule 4007(c) as well as Rule 4004(a)." App. at 8, n. 3. *See also In re Ginn*, 179 B.R. 349, 352 (Bankr. S.D. Ga. 1995) (court finds that Rules 4004 and 4007 are "virtually identical" and therefore the statement in *In re Coggin*, 30 F. 3d 1443, 1450 (11th Cir. 1994) that Rule 4004 is "jurisdictional" applies equally to Rule 4007); *In re Santos*, 112, B.R. 1001, 1004, n.2 (BAP 9th Cir. 1990) ("Because the time limit provisions of these two rules are identical, the cases applicable to Rule 4007(c) are applicable to interpreting Rule 4004(a) and (b).") Even the cases respondent cites later in his brief to support the non-jurisdictional view treat Rules 4004 and 4007 the same. *See, e.g. Farouki v. Emirates Bank International, Ltd.*, 14 F.3d 244 (4th Cir. 1994) (court analyses whether Rule 4004 is jurisdictional). Thus, the two rules are functional equivalents for the purpose of the jurisdictional issue. To decide the jurisdictional question for Rule 4004 is to also decide the question for Rule 4007. Respondent offers nothing to contradict that basic fact.

B. The Split Between the Circuits Is Real: the Fifth, Tenth and Eleventh Circuits Adhere to the Jurisdictional View and the Second, Fourth and Seventh Circuits Do Not

Respondent's second argument to deny the petition is that the split between the circuits—which he acknowledges exists with the decisions in *Neeley v. Murchisen*, 815 F.2d 345 (5th Cir. 1987) and *In re Alton*, 837 F.2d 457 (11th Cir. 1988)—has evaporated in recent years and the circuits are no longer divided over this issue. Resp. Br. at 7-8. This argument ignores the reality of what judges themselves have said—even in the most recent decisions. The conflict of authority continues at all levels, including the courts of appeal, with a number of courts pointing out that the "majority" follows the jurisdictional view. *See* Petition at 8-9. That division, if anything, is growing and will persist until it is resolved by this Court.

1. The Decisions in *Neeley* and *Alton* Are Anything But "Aberrations" and "Historical Footnotes"

Respondent attempts to support his argument that the split between the circuits no longer exists by claiming that the *Neeley* and *Alton* decisions have become "aberrations" and "historical footnotes." Resp. Br. at 8. Yet the courts in the majority disagree and have relied on *Neeley* and *Alton* continually. Most recently, in *In re Rowland*, 275 B.R. 209, 213 (Bankr. E.D. Pa. 2002), the court identified three courts of appeal as following the jurisdictional line by citing *Neeley* and *Alton*, and also the Tenth Circuit's decision in *First National Bank v. Barnes*, 1992 WL 33251 * 1 (10th Cir. 1992). And, far from being "aberrations," the courts in the Fifth and Eleventh Circuits continue to rely on *Neeley* and *Alton* to support the jurisdictional view. *See In re Tucker*, 263 B.R. 632, 637 (Bankr. M.D. Fla. 2001)

("[a]bsent extraordinary circumstances, the provisions of Rule 4007(c) are jurisdictional and non-waivable," citing *Neeley* and *Alton*); *In re Thomas*, 203 B.R. 64, 70 (Bankr. E.D. Tex. 1996) (relies on *Neeley* to support the jurisdictional view); *In re Ginn*, 179 B.R. 349, 351 (Bankr. S.D. Ga. 1995) (relies on *Alton* to hold that Rule 4007 is jurisdictional).

Courts from other circuits also continue to rely on *Neeley* and *Alton* for the jurisdictional view. In fact, the Tenth Circuit itself did so in *Barnes*, 1992 WL 33251 at *1. *See also In re Glover*, 212 B.R. 860, 862 n.1 (Bankr. S.D. Ohio 1997) (court relies on *Neeley* and *Alton* to support its holding that the rule is jurisdictional); *In re Ham*, 174 B.R. 104, 107, n. 4 (Bankr. S.D. Ill. 1994) (court cites *Alton* and *Neeley* for "majority" view). Thus, respondent's attempt to portray *Neeley* and *Alton* as "aberrations" and "historical footnotes" is flatly contradicted by a substantial line of authority that continues to rely on these decisions.

2. Decisions From the Sixth, Eighth, Ninth and Tenth Circuits Are Not In the Non-Jurisdictional Camp—They Are Limited to the "Extraordinary Circumstances" Exception

Respondent next contends that decisions from the Sixth (*In re Isaacman*, 26 F.3d 629 (6th Cir. 1994)), Eighth (*In re Moss*, 289 F.2d 540 (8th Cir. 2002), Ninth (*In re Anwiler*, 958 F.2d 925 (9th Cir. 1992) and *In re Kennerley*, 995 F.2d 145 (9th Cir. 1993)) and Tenth Circuits (*In re Themy*, 6 F.3d 688 (10th Cir. 1993)) have brought these circuits into the non-jurisdictional camp. Resp. Br. at 7. Here again, the courts themselves have expressly rejected this notion. To begin with, respondent's argument is contradicted by the court below—which recognized only the Second and Fourth Circuits as belonging to the non-jurisdictional line. App. at 14.

("we join our colleagues in the Second and Fourth Circuits in holding that the timeliness provisions here are not jurisdictional.").

The decisions that respondent claims are part of the non-jurisdictional line actually belong to a group of cases that are construed narrowly to allow equitable exceptions only under what has been referred to as "unique" or "extraordinary circumstances"—typically when the court itself sets the wrong deadline. Such decisions simply do not reach the jurisdictional issue. The Second Circuit made this plain in *In re Benedict*, 90 F.3d 50, 54 (2d Cir. 1996) (a true non-jurisdictional decision) when it stated that decisions allowing equitable extensions when the court misleads a creditor do so "without reaching the question of whether the time period imposed by Rule 4007(c) is jurisdictional," [citing *Themy*, *Kennerley* and *Anwiler*].

Recently, in *Rowland* the court made the same point:

> The majority of appellate courts most certainly have **not** held that waiver, estoppel, and equitable tolling apply to Rule 4007(c). [An earlier case] improperly groups *Themy* and *Kennerly* with *Benedict*, but the first two cases allowed the extension on the narrow grounds that the clerk had erred. *Benedict* even recognized this. 90 F.3d at 54. Furthermore, there is no mention of the contrary cases from the Fifth (*Neeley*), Tenth (*Barnes*) and Eleventh (*Alton*) Circuits cited above.

275 B.R. at 214, n. 2. (emphasis in original)

Again, in *In re Leet*, 275 B.R. 695, 699 (BAP 6th Cir. 2002) the appellate panel followed the same analysis to hold that the Sixth Circuit's decision in *Isaacman* could not be placed with the non-jurisdictional decisions: "*Isaacman* has been read narrowly by the courts of this circuit . . . . This exception has been very narrowly applied, and only in situations where the court itself made an error that resulted in the untimely action of a creditor'." [quoting, *In re Gorrell*, 260 B.R. 848, 851 (Bankr. S.D. Ohio 2001)]. Therefore, the respondent's argument that the Sixth Circuit has joined the ranks of the non-jurisdictional line has been soundly rejected by its own bankruptcy appellate panel. The respondent's attempt to place the Eighth, Ninth and Tenth Circuits with the non-jurisdictional cases should be rejected for the same reasons. In fact, the Eighth Circuit's recent decision in *In re Moss*, 289 F.3d 540, 542 (8th Cir. 2002) states that the authority to extend the time arose from the "court's own error" and cites *Issacman*, *Themy* and *Anwiler*.

In sum, respondent's second argument for denying the petition—that there is no longer a split in the circuits—is completely at odds with what the courts themselves have said in their continuing reliance on *Neeley* and *Alton* and their firm rejection of the idea that the "extraordinary circumstances" cases may be considered part of the non-jurisdictional line. As such, the split between the Fifth, Tenth and Eleventh Circuits which follow the jurisdictional view and the Second, Fourth and Seventh Circuits which do not—remains substantial and continues to manifest itself in the ongoing division in the district and bankruptcy courts.

C. The Continuing Division Among the District and Bankruptcy Courts Cannot Be Ignored

Respondent dismisses and does not even discuss the continuing division among the district and bankruptcy courts. Resp. Br. at 9. While a division among the circuits is a principal reason to grant review, the nature and extent of conflict among other lower courts is certainly relevant. Even the most recent decisions

recognize that the division among courts at all levels is very real—with the majority siding with the jurisdictional view. This conflict has created significant confusion in a fundamental area of bankruptcy law. And unless this Court intervenes, that confusion will continue.

D. Respondent Ignores This Court's Analysis in *Taylor v. Freeland & Kronz*—Which Courts in the Majority Follow

Respondent's final reason to deny the petition is that the Seventh Circuit correctly decided this issue. Resp. Br. at 9-11. Yet time and again, courts have relied upon this Court's analysis of Rule 4003 in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) to support their conclusion that the deadline for objecting to discharge is jurisdictional. *See* Petition at 13. However, respondent fails to even mention *Taylor*. Instead, respondent argues that the "text" of Rule 4004 does not "suggest" that it is jurisdictional. Resp. Br. at 10. However, such an argument runs directly contrary to the reasoning in *Taylor*. In *Taylor*, the Court considered the text of Rule 4003 for objecting to exemptions—30 days after the meeting of creditors—which parallels the deadlines set by Rules 4004 and 4007. And in *Taylor*, there was nothing in the text of Rule 4003 that allowed for an equitable exception to the deadline set by that rule. *See also In re Laurain*, 113 F.3d 595, 597 (6th Cir. 1997) (after considering the "unambiguous" language of Rule 4003, court holds that it is "jurisdictional").

Respondent also argues that because the bankruptcy court may extend the deadline, this indicates that it is not jurisdictional. Resp. Br. at 10. Here again, this argument cannot be squared with *Taylor*. In *Taylor*, this Court explicitly noted that the creditor "could have asked the Bankruptcy Court for an extension of time to object." 503 U.S. at 644. Yet after noting that an extension of time was permissible under Rule 4003, this Court did not open the door to equitable exceptions to the deadline.

Finally, respondent argues that the Seventh Circuit correctly determined that a policy of post-judgment "finality" would be better served if the deadline was not jurisdictional. Resp. Br. at 11. However, *Taylor*, expressly rejected a policy argument that equitable exceptions should be allowed to guard against exemptions claimed in bad faith. 503 U.S. at 643-45. *Cf.* (dissent, Stevens, J.), *id.* at 649 (arguing in favor of an equitable exception based on policy concerns). The "finality" endorsed in *Taylor* arose from a strict application of the time limit in Rule 4003: "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Id.* at 644. In short, each of the reasons respondent gives to justify the Seventh Circuit's decision fails under the weight of this Court's reasoning in *Taylor*. Therefore, his final reason to deny the petition fails as well.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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JUN 12 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANDREW J. KONTRICK,

Petitioner,

v.

ROBERT A. RYAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

United States Bankruptcy Court for the Northern District of Illinois

Date	
November 12, 1997	Order extending time for objecting to discharge until January 13, 1998
January 13, 1998	Adversary complaint
February 12, 1998	Answer to adversary complaint
May 6, 1998	Order granting leave to file amended complaint
May 6, 1998	Amended adversary complaint
June 10, 1998	Answer to amended complaint
March 22, 1999	Plaintiff's motion for summary judgment
February 25, 2000	Memorandum opinion granting summary judgment on Count I
March 7, 2000	Defendant's motion to reconsider memorandum opinion
March 8, 2000	Amended memorandum opinion
June 8, 2000	Opinion denying motion to reconsider
June 13, 2000	Order entered denying motion to reconsider

June 13, 2000	Judgment order granting summary judgment on Count I and denying discharge
June 23, 2000	Defendant's motion to alter or amend judgment
July 10, 2000	Order denying motion to alter or amend judgment
July 11, 2000	Defendant's motion for extension of time to appeal
July 13, 2000	Order granting extension of time to appeal to August 9, 2000
August 8, 2000	Defendant's notice of appeal

United States District Court for the Northern District of Illinois

Date	
September 18, 2000	Record on appeal filed
October 12, 2000	Appellant-defendant's opening brief
December 20, 2000	Appellee-plaintiff's response brief
January 10, 2001	Appellant-defendant's reply brief
May 30, 2001	Memorandum opinion affirming bankruptcy court
May 31, 2001	Judgment entered affirming bankruptcy court
June 27, 2001	Notice of appeal

United States Court of Appeals
for the Seventh Circuit

Date	
June 28, 2001	Appeal docketed
July 19, 2001	Record on appeal filed
August 7, 2001	Appellant's brief
October 11, 2001	Appellee's brief
October 26, 2001	Appellant's reply brief
January 10, 2002	Oral argument
July 8, 2002	Opinion affirming district court
July 22, 2002	Petition for rehearing and for rehearing en banc
August 27, 2002	Order denying petition
September 4, 2002	Mandate issued

LIST OF RELEVANT OPINIONS BELOW

The following opinions are omitted from the Joint Appendix because they appear in the Appendix to the Petition for Certiorari at the pages noted:

Amended Opinion of the United States Bankruptcy Court for the Northern District of Illinois, dated March 8, 2000.....App. 39

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The following opinion also appears in the Appendix to the Petition for Certiorari:

Opinion of the United States Court of Appeals for the Seventh Circuit, dated July 8, 2002 .....App. 1

No. 02-819

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QUESTION PRESENTED

Bankruptcy Rule 4004 sets the deadline for objecting to a debtor's discharge in bankruptcy. The question presented is whether the deadline set by Rule 4004 is mandatory and jurisdictional and thus cannot be waived.

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The opinion of the court of appeals below is reported as *In re Kontrick*, 295 F.3d 724 (7th Cir. 2002) and is reprinted in the Appendix to the Petition for Certiorari. Pet. App. 1-23. The opinion of the district court is reported as *Ryan v. Kontrick*, 2001 U.S. Dist. LEXIS 7473 (N.D. Ill. May 30, 2001). Pet. App. 25-38. The opinions of the bankruptcy court are unreported. Pet. App. 39-75.

JURISDICTION

The court of appeals entered its judgment on July 8, 2002. Petitioner filed a petition for rehearing and for rehearing en banc on July 22, 2002 which was denied on August 27, 2002. Pet. App. 24. The petition for certiorari was filed on November 25, 2002 and granted on April 28, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

The opinion of the court below involves Federal Rule of Bankruptcy Procedure 4004 (Bankruptcy Rule). The rule states in part:

> (a) [A] complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors....
>
> (b) On motion of any party in interest, after hearing on notice, the court may for cause extend the time to file a complaint objecting to discharge. The motion shall be filed before the time has expired.

Bankruptcy Rule 4007(c) contains a parallel provision which states:

> A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors. . . . On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Both Rules 4004 and 4007 are included in Bankruptcy Rule 9006(b)(3) which states in part:

> The court may enlarge the time for taking action under Rules ... 4004(a) [and] 4007(c) ... only to the extent and under the conditions stated in those rules.

Rule 9006(b)(3) is modeled on Federal Rule of Civil Procedure 6(b) which states in part:

> [T]he court may not extend the time for taking any action under Rules 50(b), and (c)(2), 52(b), 59(b), (d) and (e) and 60(b), except to the extent and the conditions stated in them.

The complete text of Fed. R. Civ. P. 6(b), Bankruptcy Rule 9006(b) and related rules, Fed. R. Crim. P. 45(b) and Fed. R. App. P. 26(b), are reprinted in the attached appendix.

STATEMENT OF THE CASE

A. Kontrick Discloses He No Longer Has a Joint Checking Account Almost Four Years Before His Bankruptcy

Petitioner Andrew Kontrick and respondent Robert Ryan are physicians who practiced medicine

together. Pet. App. 2. Disputes arose over their medical practice which were submitted to arbitration. R. 1, no. 13, Ex. C, ¶ 9.[1] In July 1992, an arbitrator awarded Ryan $47,156 in damages, plus attorney fees and costs. *Id.* In October 1992, the parties began a second arbitration. *Id.* ¶ 11.

Kontrick and his wife owned a joint checking account. *Id.* ¶ 16. Kontrick deposited his salary to that account and the family expenses were paid from it (family account). *Id.* Sometime in late 1992 or early 1993, Kontrick removed his name from the account. *Id.* After doing so, he continued to deposit his salary to the same account and the family expenses continued to be paid from it. *Id.*

In June 1993, Ryan attempted to collect the first arbitration award by having Kontrick testify at a citation to discover assets. *Id.*, no. 8, Ex. 7. During this testimony, Kontrick disclosed to Ryan's counsel that he no longer had a joint checking account with his wife and that he continued to deposit his salary to the same account from which his wife paid the family expenses. *Id.* at Tr. 14-18. Kontrick also disclosed that he had "divested" himself of certain other assets. *Id.* at 9-13, 22-25. One month later, Kontrick paid the full amount of the first arbitration award. *Id.*, no. 13, ¶ 13.

The second arbitration continued for another two years. *Id.* ¶ 20. In May 1995, the arbitrator issued an award in favor of Ryan. *Id.* This award was confirmed as a judgment in state court in the amount of $614,000 in December 1996. *Id.* After attempting unsuccessfully to settle the case, Kontrick filed a

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[1] The record citations are designated "R. __" and refer to the numbered items in the record on appeal from the bankruptcy court.

petition for relief under chapter 7 of the Bankruptcy Code in April 1997. *Id.* ¶ 22.

B. Ryan Files the Family Account Claim at Issue Almost Four Months After the Rule 4004 Deadline

Rule 4004 states that an objection to a debtor's discharge of debts must be filed within 60 days of the first meeting of creditors, unless the bankruptcy court extends the time. In this case, Ryan received three extensions of the deadline set by Rule 4004. Pet. App. 3-4; R. 1, no. 1. The last one was to January 13, 1998. *Id.* On that date, Ryan filed a seven-count complaint objecting to Kontrick receiving a general discharge of his debts under section 727(a) of the Bankruptcy Code and also seeking a determination of the nondischargeability of Kontrick's debts to Ryan under section 523(a) of the Code. Pet. App. 4. In the count at issue here, Count I, Ryan identified specific transfers of property that he alleged Kontrick made within one year of bankruptcy with an actual intent to defraud as grounds to bar his discharge under section 727(a)(2)(A). Pet. App. 4, n. 1; R. 1, no. 2, ¶¶ 50-55. However, the complaint contained no allegations regarding the family account. Pet. App. 4, n.1.

Almost four months after the deadline for objecting to discharge had expired, Ryan filed an amended complaint on May 6, 1998. *Id.* at 4; R. 1, no. 4. This complaint added a new paragraph to Count I which for the first time alleged that Kontrick's removal of his name from the family account and his deposits of salary to the account were grounds to bar his discharge. Pet. App. 4; R. 1, no. 4, ¶ 56. Kontrick answered the amended complaint, but did not raise the untimeliness of this new claim. Pet. App. 4, 16.

C. The Bankruptcy Court Denies Discharge on the Family Account Claim Alone

In March 1999, Ryan filed a motion for summary judgment. Pet. App. 4. This motion alleged numerous grounds to deny discharge. Pet. App. 43-46. Kontrick moved to strike many of Ryan's allegations as untimely under Rule 4004, pointing out that once the deadline had passed, no new objection could be added outside the original complaint. R. 1, no. 10, pp. 1, 4-5. He also noted that the family account claim was not in the original complaint. *Id.*, p. 4. The bankruptcy court struck a number of allegations as untimely and denied the motion for summary judgment on all the grounds except one—the family account claim. Pet. App. 47-50, 55. On that ground alone, the court granted summary judgment and denied Kontrick's discharge. *Id.* at 64.

Before judgment was entered, Kontrick moved to reconsider and maintained that the bankruptcy court had no jurisdiction to consider the family account claim because it had been filed after the Rule 4004 deadline. *Id.* at 71. Kontrick also argued that in opposing Ryan's many other allegations as untimely, he had also sufficiently raised the untimeliness of the family account claim. *Id.* at 72. After acknowledging case law to the contrary, the bankruptcy court held that the Rule 4004 deadline was not jurisdictional and that Kontrick had not adequately preserved an objection to the lateness of the claim. *Id.* at 71-72. The court also held that the issue could not be raised in a motion to reconsider and deemed it "waived." *Id.*

D. The District Court and Court of Appeals Hold That Rule 4004 Is Not Jurisdictional

Kontrick appealed to the district court and argued that the majority of courts have held that the deadline for objecting to discharge is jurisdictional and cannot be waived. Pet. App. 29. The district court

noted that courts were divided on the issue. *Id.* at 30-31. It then rejected the majority line of cases and held that the time limit is not jurisdictional and affirmed the bankruptcy court. *Id.* at 31-32.

On appeal to the Seventh Circuit, Kontrick again urged the court to follow the majority line holding that the Rule 4004 deadline is jurisdictional. The court began its analysis by recognizing that there was "no dispute" that Ryan's amended complaint was filed beyond the Rule 4004 deadline and "there was no court-approved extension of time permitting him to file when he did." *Id.* at 6. The court also recognized that the original complaint "did not include a factual allegation with respect to the family account." *Id.* at 4, n.1. It also noted that both the bankruptcy and district courts had "assumed that the amended complaint and the family account allegation of May 6, 1998 were untimely" and Ryan "did not contest this assumption on appeal." *Id.* at 6, n.2. As such, the court proceeded on the basis the family account claim in the amended complaint did not "relate back" to the original complaint. *Id.*[2]

The Seventh Circuit first acknowledged the division of authority as to whether the time limit was jurisdictional. *Id.* at 7-8. The court then examined the text of Rule 4004 and found it did not provide a "definitive answer" and thus was required to "look elsewhere." *Id.* at 8-9. Among other things, the court asserted that because the rule gave the bankruptcy court discretion to extend the deadline before it expired, this implied that it also had discretion to extend the deadline after it expired. *Id.* at 11, 13.

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[2] In his brief opposing the petition for certiorari, Ryan acknowledged that the family account claim was "asserted for the first time" in the amended complaint filed after the deadline. Resp. Br. at 3.

The court also attempted to distinguish *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). *Id.* at 14-16, n.4. In *Taylor*, this Court held that the deadline set by Bankruptcy Rule 4003 for objecting to a debtor's claim of exemptions was mandatory and could not be extended on equitable grounds, even for a claim not made in good faith. The court below gave two reasons to distinguish *Taylor*. First, the court found that because *Taylor* did not state that a debtor had an "unlimited time" to contest a late objection, the Rule 4003 deadline could still be extended by other equitable doctrines such as waiver. *Id.* at 15, n.4. Second, it noted that *Taylor* stressed the policy of "finality." *Id.* From this, the court reasoned that because the doctrine of waiver also promoted finality, it followed that Rule 4004 could be waived. *Id.* After finding that the deadline was not jurisdictional, the court rejected Kontrick's other arguments and affirmed the district court.

SUMMARY OF ARGUMENT

Bankruptcy Rule 4004 sets the time limit for objecting to a debtor's discharge. It is not ambiguous. It states that an objection to discharge must be filed within 60 days of the meeting of creditors, unless the court extends the time. The rule also states that any motion for such an extension must be filed before the deadline expires.

What is more, Rule 9006(b)(3) states that Rule 4004 (and a limited number of other rules) may not be extended for "excusable neglect," but only under the terms contained in the rules themselves. When these rules were adopted in 1983, the exclusion of Rule 4004 from the excusable neglect standard marked a departure from past practice and was designed to promote finality and certainty. Based on the plain meaning of the rule, a majority of courts has held that

this time limit is jurisdictional and may not be altered by equitable doctrines.

Under settled precedent from this Court, the plain meaning is "conclusive" unless it is "demonstrably at odds" with the drafters' intent. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). Here, the plain meaning is fully harmonious with that intent. In fact, the rulemakers intentionally placed Rule 4004 among a pattern of similar federal rules whose jurisdictional nature is well established.

In particular, Rule 9006(b)(3), which limits Rule 4004, is patterned after Federal Rule of Civil Procedure 6(b). Other federal rules, such as Criminal Rule 45(b) and Appellate Rule 26(b) are also modeled on Rule 6(b). The rules based on Rule 6(b) have long been construed as unambiguous deadlines that may not be altered by equitable defenses. Indeed, in *United States v. Robinson*, 361 U.S. 220, 228 (1960), this Court observed that when Rule 45(b) was adopted it "must be presumed" that the drafters were aware of the established precedent construing Rule 6(b) as "mandatory and jurisdictional." The same may be said for Rules 4004 and 9006(b). When these rules were adopted, it must also be presumed that the rulemakers were aware of the longstanding construction of Rule 6(b). Thus, there is no indication that the drafters intended Rule 9006(b)(3) to be read any differently than Rule 6(b) or its counterparts.

In addition, this Court's decisions in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) and *United States v. Carlisle*, 517 U.S. 416 (1996) reenforce the conclusion that Rule 4004 is jurisdictional. In *Taylor*, this Court considered the closely analogous Rule 4003 that sets the deadline for objecting to a debtor's exemptions. Based on the plain language of Rule 4003, the Court held that a late objection could not be extended on equitable

grounds, even for an exemption claimed without good faith. In *Carlisle*, the Court found that Criminal Rules 29 and 45(b) were "plain and unambiguous" and therefore a motion for acquittal filed even one day after the deadline could not be allowed on equitable grounds. The language and structure of Rules 4004 and 9006(b)(3) mirror the rules in *Carlisle* and thus its reasoning applies with equal force here.

The court below looked beyond the text of Rule 4004 to a variety of policy reasons to find that the rule was not jurisdictional. None of these policy arguments are convincing. Yet whatever their merits, as this Court stated in *Carlisle*, the unambiguous language of the rule may not be ignored to obtain "optimum policy results." 517 U.S. at 430. In sum, the plain meaning of Rules 4004 and 9006(b)(3) fits squarely with the drafters' intent and does not allow for equitable exceptions such as waiver.

ARGUMENT

A. The Unambiguous Language of Rules 4004 and 9006(b)(3) Demonstrates That the Deadline Is Jurisdictional

1. The Deadline Was Excluded from the Excusable Neglect Standard and Kept Short to Promote a Debtor's Fresh Start

One of the fundamental purposes of bankruptcy law is to provide a debtor with a "fresh start" by discharging past debts, in exchange for distributing the debtor's current property to creditors. *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918). And, "[t]he discharge is the most important element of the debtor's fresh start." *In re Nowinski*, 291 B.R. 302, 305 (Bankr. S.D.N.Y. 2003) (citing H.R. Rep. 95-595 at 128 (1977) and *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). To be sure, the right to a discharge is not unlimited and the Bankruptcy

Code sets out certain grounds by which a creditor may object to a discharge. *See* 11 U.S.C. § 727(a). The Code also provides certain grounds by which a creditor can object to the "dischargeability" of a specific debt. *See* 11 U.S.C. § 523(a). At the same time, any exceptions to discharge are construed strictly against creditors and liberally in favor of debtors to further the fresh start policy. *See, e.g., In re Baylis*, 313 F.3d 9, 17 (1st Cir. 2002).

Rule 4004 governs the time for objecting to discharge under section 727(a). Similarly, Rule 4007 sets the time for objecting to the dischargeability of a particular debt under section 523(a). Both rules contain the same language that an objection "shall be filed no later than 60 days after the first date set for the meeting of creditors" and that any motion to enlarge the deadline must be "filed before the time has expired." Because the rules are virtually identical, courts have treated them as interchangeable with respect to the filing deadline. As the court below stated: "Because the rules are almost identical, it is appropriate to consider decisions by courts construing Rule 4007(c) as well as Rule 4004(a)." Pet. App. 8, n.3. *See also In re Ginn*, 179 B.R. 349, 352 (Bankr. S.D. Ga. 1995) (in holding that the deadline is jurisdictional, the court finds that Rules 4004 and 4007 are "virtually identical").

When the current Bankruptcy Rules were adopted in 1983, Rules 4004 and 4007 were listed among the rules in Rule 9006(b)(3) that could not be enlarged for excusable neglect, but only by the terms contained in the rules themselves.[3] This represented a

[3] The Bankruptcy Rules are promulgated under this Court's rulemaking authority. 28 U.S.C. § 2075. The process for establishing these rules is essentially the same as that for other federal rules. 28 U.S.C. § 2073. The current Bankruptcy Rules were adopted in 1983. *See In re Figueroa*, 33 B.R. 298, 300 (Bankr. S.D.N.Y. 1983).

significant departure from past practice because the predecessor rule, 906(b), had in fact allowed extensions of time for objecting to discharge based on excusable neglect. *See In re Kearney*, 105 B.R. 260, 262-64 (Bankr. E.D. Pa. 1989) (discussing history of the rules). By preventing the deadline from being extended for excusable neglect, the drafters sought to promote finality and certainty: "It is clear that by prohibiting that which was formerly permitted, Congress intended to no longer subject the preeminent fresh start policy to the uncertainties of excusable neglect in failing to timely object to discharge of a claim." *Id.* at 262 (quoting *In re Figueroa*, 33 B.R. 298, 300 (Bankr. S.D.N.Y. 1983)). *See also Neeley v. Murchison*, 815 F.2d 345, 346 (5th Cir. 1987) (court notes that not allowing Rule 4007 to be extended for excusable neglect was a departure from past practice and holds that the rule could not be equitably tolled).

In addition, the time for objections—60 days from the first meeting of creditors—was also designed to promote the fresh start policy. "This fixed relatively short limitation period enables the debtor and creditors to make better-informed decisions early in the proceeding." *Neeley*, 815 F.2d at 346-47. *See also Nowinski*, 291 B.R. at 305 ("the debtor has an interest in a prompt resolution of discharge issues, and the law sets a tight time frame for discharge objections.") (citation omitted); *In re Ham*, 174 B.R. 104, 107 (Bankr. S.D. Ill. 1994) (the short time for objections is "intended to protect the debtor's fresh start"). As such, based on the policies of finality, certainty and a fresh start underlying the deadline, the law "places a heavy burden on the creditor to protect his rights." *See Neeley*, 815 F.2d at 347.

2. Based on the Plain Meaning of Rules 4004 and 9006(b)(3), the Deadline Is Jurisdictional

The text of a statute or rule is the starting point for determining its meaning. *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) ("Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.") (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)). If the language of the rule is unambiguous, then the "plain meaning" of the words is "conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

The language of Rules 4004 and 4007 is straightforward: a creditor must file an objection to discharge "no later than 60 days after the first date set for the meeting of creditors" and any motion to extend the time "shall be filed before the time has expired." Rule 9006(b)(3) is also unequivocal and states that Rules 4004 and 4007 may not be extended for "excusable neglect," but "only to the extent and under the conditions stated" in the rule.

Thus, the language of Rules 4004 and 4007 is neither complicated nor unclear. Time and again, courts have relied on this plain meaning to hold that the deadline may not be expanded by equitable exceptions. In *In re Alton*, 837 F.2d 457, 459 (11th Cir. 1987) (per curiam), the court held that Rule 4007 was "mandatory" and there was no equitable discretion to extend the deadline after it had expired: "The dictates of the [Bankruptcy] Code and Rules are clear. It is not

our place to change them." Similarly, in *In re Rowland*, 275 B.R. 209, 215 (Bankr. E.D. Pa. 2002), the court found that the "plain language" of Rule 4007 and its "specific exclusion" under Rule 9006(b)(3) confirmed its holding that the rule was "jurisdictional."[4] *See also In re Goodwin*, 215 B.R. 710, 714 (Bankr. W.D. Tenn. 1997) (court follows the "majority" and holds that Rule 4007 is jurisdictional based on its "plain meaning"); *In re Glover*, 212 B.R. 860, 862 (Bankr. S.D. Ohio 1997) (court agrees with the "majority" because the "language of the Code and Rules is quite clear"). Therefore, because the language of these rules is not ambiguous, they should be read to give effect to their plain meaning; namely, that a court has no authority to extend the deadlines based on equitable exceptions imported from outside the rules.

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[4] As to the use of the term "jurisdictional" in this context, the court in *In re Leet*, 274 B.R. 695, 700, n.6 (B.A.P. 6th Cir. 2002) observed:

> We do not think any real light is shed on the subject by calling the time limits established by rules "jurisdictional," and we view usage of the term as a shorthand denomination of the idea that rules exist, not just to regulate the parties, but in some cases to limit courts in the exercise of their powers and discretion. Justice Ginsburg has criticized the usage, stating, "It is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction'." *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J. concurring)

Petitioner uses the term "jurisdictional" here as commonly used to describe a deadline that a court has no authority to extend or alter with equitable exceptions.

B. The Plain Meaning Harmonizes With the Drafters' Intent: Rule 9006(b)(3) Was Modeled on Rule 6(b) Which has Long Been Deemed Jurisdictional

1. Rule 4004 Should Be Read Consistently With the Other Deadlines in Rule 9006(b)(3) That Do Not Permit Equitable Exceptions

Reading Rule 4004 as not allowing equitable exceptions is fully in accord with the drafters' intent. Words also derive their meaning from how they fit within a pattern or a whole—whether it be a statutory scheme or, as in this case, within a system of rules. *See FDA v. Brown & Williamson Tobacco Corp*, 529 U.S. 120, 133 (2000) (words must be read "with a view to their place in the overall statutory scheme" and therefore a court should interpret a statute as a "symmetrical and coherent regulatory scheme and fit, if possible, all parts into a harmonious whole.") (citations omitted). There is also a presumption that if the same words are used elsewhere within a coherent plan that they have the same meaning. *See United States Nat'l. Bank v. Independent Ins. Agents, Inc.*, 508 U.S. 439, 460 (1993) ("[p]resumptively, identical words used in different parts of the same act are intended to have the same meaning.") (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

In this case, the rulemakers intentionally placed Rule 4004 among similar federal rules whose jurisdictional nature is beyond dispute. Rule 9006(b) details "enlargements of time" for three types of rules. Rule 9006(b)(1) deals with rules "in general" and allows enlargements for "cause" if the request is made *before* a time limit has expired and for "excusable neglect" *after* it has expired. Subsection (b)(2) specifies rules for which, as stated in its heading, "enlargement [is] not

permitted." Subsection (b)(3) enumerates rules—among them 4004 and 4007—for which "enlargement [is] limited" and that may be extended "only to the extent and under the conditions stated in those rules."

Among the rules listed in 9006(b)(3) are those whose jurisdictional nature is well settled. Rule 3002(c) is listed in 9006(b)(3) and states that proofs of claim for certain bankruptcy cases must be filed within 90 days of the meeting of creditors, unless otherwise extended by the rule. Courts have read the deadline set by Rule 3002(c) as unambiguous and therefore not subject to equitable exceptions. *See In re Gardenhire*, 209 F.3d 1145, 1148 (9th Cir. 2000) (based on the "plain meaning" of the Bankruptcy Code and Rules, the deadline set by Rule 3002(c) is not subject to equitable tolling—even though other deadlines in the Code may be); *Matter of Greenig*, 152 F.3d 631, 634-35 (7th Cir. 1998) (Rule 3002(c) is based on "clear and unambiguous language" and the bankruptcy court has no equitable power to extend the time fixed by the rule.)

Rule 9006(b)(3) also includes Rule 4003 (the subject of the *Taylor* case) which sets the time for objecting to a debtor's exemptions. Based on the text of Rules 4003(b) and 9006(b)(3), courts readily conclude that this deadline is jurisdictional. As stated in *In re Laurain*, 113 F.3d 595, 597 (6th Cir. 1997):

> Rule 4003(b) unambiguously requires that an extension of time be granted within the prescribed thirty-day period. ... Moreover, Fed. R. Bankr. P. 9006(b)(3) provides that the court may enlarge the time for taking action under Rule 4003(b) "only to the extent and under the conditions stated in those rules." Thus, Rule 4003(b) should be viewed as jurisdictional.

See also In re Stoulig, 45 F.3d 957 (5th Cir. 1995) (per curiam), *affirming Stoulig v. Traina*, 169 B.R. 597 (E.D. La. 1994) (court affirms district court's holding that it "was without jurisdiction" to grant an extension after the Rule 4003 deadline expired).

The time to appeal a bankruptcy court decision under Rule 8002 is also part of Rule 9006(b)(3). Once again, the language of these rules leaves little doubt that this time limit is jurisdictional. *Matter of Bond*, 254 F.3d 669, 673 (7th Cir. 2001) ("Rule 8002(a) describes conditions precedent that are mandatory and jurisdictional."); *In re Bushnell*, 273 B.R. 359, 366-68 (Bankr. D. Vt. 2001) (based on the text of Rules 8002 and 9006(b)(3), the time to appeal was jurisdictional and the court had no equitable power to authorize an extension).

2. Rule 9006(b)(3) Is Patterned After Rule 6(b) Which Has Been Read as Mandatory and Jurisdictional

Rule 9006(b) is itself modeled on Fed. R. Civ. P. 6(b). In *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380 (1993), this Court examined the meaning of "excusable neglect" in Rule 9006(b)(1) and recognized:

> Our view that the phrase "excusable neglect" found in Bankruptcy Rule 9006(b)(1) is not as limited as petitioner would have it is also strongly supported by the Federal Rules of Civil Procedure, which use that phrase in several places. Indeed, *Rule 9006(b) was patterned after Rule 6 (b) of those Rules.*

Id. at 391. (emphasis added).[5] In fact, the language and structure of Rule 9006(b) come directly from Rule 6(b). Both rules describe enlargements for "cause" before a deadline expires and for "excusable neglect" afterwards. And both list a narrow class of rules that are excepted from the excusable neglect standard and whose time periods may be enlarged only by the terms of the rules themselves. The rules excepted by Rule 6(b) have long been deemed to be jurisdictional. *See, e.g., Albright v. Virtue*, 273 F.3d 564, 571 (3d Cir. 2001) ("Rule 6(b) provides that the time limit of Rule 59(e) may not be judicially extended . . . . The ten-day period is jurisdictional and cannot be extended in the discretion of the district court.") (citation omitted).

Rule 6(b) also serves as the model for two other federal rules: Fed. R. Crim. P. 45(b) and Fed. R. App. P. 26(b). Rule 45(b) follows Rule 6(b) and describes extensions for cause and excusable neglect and then states that "the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in those rules." Here again, the rules listed in Rule 45(b) have been read as not allowing equitable exceptions.

Such a reading of Rule 45(b) was firmly established in *United States v. Robinson*, 361 U.S. 220 (1960). In *Robinson*, the defendants were convicted of manslaughter and filed their notice of appeal late because of a "misunderstanding" with their counsel. *Id.* at 221. The lower courts allowed the late notice of appeal based on excusable neglect. *Id.* at 222. This Court reversed. First, it found that the language of

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[5] It is worthy of note that even though *Pioneer* was a 5-4 decision, all nine justices agreed that Rule 9006(b) should be interpreted to be consistent with Rule 6(b). 507 U.S. at 400-01 (*Souter, J.* dissenting).

Rule 45(b) was "quite plain and clear," since "[i]t specifically says that the Court may not enlarge the period for taking an appeal." *Id.* at 224. However, not only did the Court find that Rule 45(b) was clear, it also stressed that it had to be read in light of the existing "judicial construction" of Rule 6(b):

> But there is more. The prototype for Rule 45(b) was Rule 6 of the Federal Rules of Civil Procedure. ... It had consistently been held that Civil Rule 6(b) was mandatory and jurisdictional and could not be extended regardless of excuse. It must be presumed that the Advisory Committee and the Justices of this Court were aware of the limiting language of Civil Rule 6(b) and of the judicial construction it had received when they prepared and adopted the Federal Rules of Criminal Procedure.

Id. at 228-29. As a result, the Court held that the district court had no discretion to extend the deadline. *Id.* at 229. Other rules excepted in Rule 45(b) are also deemed jurisdictional. *See United States v. Hall*, 324 F.3d 720, 721 (D.C. Cir. 2003) (seven-day limit in Rule 33(b)(3) is "jurisdictional").

Appellate Rule 26(b) is also derived from Rule 6(b). *See* Advisory Committee Notes (1967 Adoption). The rule states that while a court may extend a deadline for cause generally, it may not do so for a notice of appeal (Fed. R. App. P. 4) or petition to appeal (Fed. R. App. P. 5). The rules excepted in Rule 26(b) are consistently treated as jurisdictional. *See Carr Park, Inc. v. Tesfaye*, 229 F.3d 1192, 1194 (D.C. Cir. 2000) ("plain language" of Rule 26(b) expressly does not allow court to extend time for filing petition to appeal).

In short, the rulemaking process has long used Rule 6(b) as a model when selecting a limited number

of rules that may be enlarged only under their own terms and not for excusable neglect. When the rulemakers adopted Rules 4004 and 9006(b)(3), there was already an established line of authority holding that Rule 6(b) and its counterparts set deadlines that were mandatory and jurisdictional. It must be presumed that the rulemakers were aware of that longstanding judicial construction. *See Robinson*, 361 U.S. at 228-29. As a result, there is no reason to believe that the rulemakers intended these Bankruptcy Rules to be read any differently from those based on Rule 6(b).

3. This Court's Opinions in *Taylor* and *Carlisle* Reenforce the Jurisdictional Nature of Rule 4004

This Court's decisions in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) and *Carlisle v. United States*, 517 U.S. 416 (1996) reenforce the conclusion that the plain meaning of Rule 4004 does not allow for equitable exceptions.

a.) *Taylor*: There Is No Equitable Exception to the Rule 4003 Deadline

In *Taylor*, the Court considered the closely analogous Rule 4003. This rule requires that objections to a debtor's claim of exempt property be filed within 30 days of the meeting of creditors. In *Taylor*, the Court held that even though the debtor may have had no reasonable basis to claim an exemption, an objection made after the deadline could not be considered under any "good faith" exception. *Id.* 643-44. The Court stated, "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Id.* at 644.

Courts have relied on *Taylor* repeatedly to find that the deadline for objecting to discharge is jurisdictional. Recently, in *In re Leet*, 274 B.R. 695

(B.A.P. 6th Cir. 2002), the bankruptcy appellate panel held that the bankruptcy court had no equitable power to extend the deadline in Rule 4007 and stated, "Rule 4003(b), the focus of attention in *Taylor*, is similar to the rule at issue in this case, 4007(c), in that both rules provide a time limit within which papers must be filed." 274 B.R. at 697. *See also Glover*, 212 B.R. at 863 ("[*Taylor*] has made it clear that the deadlines set by [Rule 4007] are jurisdictional in nature."); *In re Thomas*, 203 B.R. 64, 68 (Bankr. E. D. Tex. 1996) (the court emphasizes the similarities between Rules 4003 and 4007 and relies on the "plain meaning" construction in *Taylor* to find that Rule 4007 is jurisdictional).

The court below offered two reasons to distinguish *Taylor*. Pet. App. 15, n.4. Neither is persuasive. First, the court observed that *Taylor* did not state that a debtor had an "unlimited time" to challenge a late objection or that "Rule 4003(b) was not subject to the usual equitable doctrines that apply to other deadlines and statutes of limitations." *Id.* However, merely because the Court did not address other equitable exceptions in *Taylor*—which were not at issue—can hardly justify adding such exceptions to Rule 4003. The *Taylor* decision rested on the plain language of Rule 4003 and did not allow equitable tolling, even in the face of an exemption claimed without good faith. Therefore, if Rule 4003 was clear enough for the Court to reject an equitable exception for bad faith, the door was not left open for other equitable defenses such as waiver. To do so would effectively nullify the result in *Taylor*.

The court's second reason to distinguish *Taylor* also falls short of the mark. The court stated that while *Taylor* did "stress the importance of deadlines, we believe this emphasis supports our conclusion, rather than undermines it." *Id.* at 15 (citation omitted). Based on this, the court reasoned that because the doctrine of

waiver also promotes "finality," it follows that Rule 4004 may be waived. *Id.* Yet by this reasoning, every jurisdictional rule would be waivable, which is simply not so. Hence, though waiver may promote finality, that general proposition does nothing to answer the question of whether Rule 4004 is jurisdictional in the first place. Thus, the court below offered no convincing reason to distinguish *Taylor*.

b.) *Carlisle*: There Is No Authority to Allow a Late Motion Under the Parallel Rules 29 and 45(b)

The *Taylor* decision reenforces that Rule 4004 may not be altered by equitable doctrines. The Court's opinion in *Carlisle* "hammer[s] the point home." *Leet*, 274 B.R. at 697. In *Carlisle*, a criminal defendant filed his motion for acquittal one day after the deadline set by Fed. R. Crim. P. 29(c). *Id.* at 418. The Court began its analysis by noting that Rule 45(b) excepts Rule 29 from the excusable neglect standard and then found that "[t]hese Rules are plain and unambiguous." *Id.* at 421. As a result, "[t]here is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely post-verdict motion for judgment of acquittal...." *Id.*

In response to an argument that the district court had "inherent power" to permit a late motion, the Court stated, "Federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Id.* at 426 (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988)). The Court also rejected the argument that not allowing a late motion would lead to "needless" appeals and habeas corpus proceedings: "Assuming, arguendo, that these contentions are accurate, we cannot permit them to alter our analysis, for we are not at liberty to ignore the mandate of Rule 29 in order to obtain 'optimal' policy results." *Id.* at 430

(citing *Robinson* 361 U.S. at 229-30). Therefore, the Court held that the district court could not use equitable doctrines to allow the late-filed motion. *Id.* at 433.

Rules 4004 and 9006(b)(3) should be read in the same way that the Court read the parallel Rules 29 and 45(b) in *Carlisle*. As the court stated in *Leet*, when it relied on *Carlisle* to hold that Rule 4007 was not subject to equitable exceptions:

> In *Carlisle* the Court emphasized that "plain and unambiguous" rules leave "no room" for granting extensions, even where papers are filed late due to attorney error. There is "no room" because rules are drafted and assembled into systems so as to provide precise solutions to recurrent problems in the law, such as the problem of how to proceed in bankruptcy court or the district court or the appellate courts. The drafter's goal is, above all, a coherent plan of procedure with the details carefully worked out to assure clarity and eliminate internal conflicts, thereby to arrive at a finished body of work capable of an easy and confident application.

274 B.R. at 698 (citation omitted).

In sum, the plain meaning of Rule 4004 should be "conclusive" unless it is "demonstrably at odds" with the drafters' intent. *Ron Pair*, 489 U.S. at 242. Here, there is not the slightest hint that the unambiguous mandate of the rule is at odds with the intent of the rulemakers. In fact, when the rulemakers drafted Rule 4004, they intentionally departed from past practice by excluding it from the excusable standard and placed it among a category of rules which were known to be jurisdictional by established precedent. Thus, the plain

meaning of Rule 4004 harmonizes with the rulemakers' intent. This fact, together with the Court's reasoning in *Taylor* and *Carlisle*, all converge at a single point: the deadline in Rule 4004 is jurisdictional and cannot be waived.

C. The Policy Arguments Advanced By the Court Below Cannot Override the Plain Meaning of Rule 4004

The court below did not find that Rule 4004 was ambiguous. However, it stated that its text did not "yield a definitive answer" and therefore it was required to "look elsewhere." Pet. App. 8-9. In looking beyond the text, the court advanced several policy arguments. None of them can withstand close scrutiny.

The court first analyzed a decision that many courts have followed, *In re Kirsch*, 65 B.R. 297 (Bankr. N.D. Ill. 1986).[6] Pet. App. 9-11. In *Kirsch*, the court held that because the rules listed in Rule 6(b) are jurisdictional and because Rule 9006(b)(3) is patterned after 6(b), Rule 4007 is also jurisdictional. *Id.* at 301-02. The court below found *Kirsch* to be "thoughtful," but still rejected it. Pet. App. 9-10. To reach this conclusion, the court needed to read the language of Rule 9006(b)(3) as more elastic than the virtually identical language of Rule 6(b). The reason the court gave to do so was that Rule 6(b) dealt with postjudgment deadlines and Rule 9006(b)(3) dealt with prejudgment deadlines. *Id.* at 10. From this, the court concluded that "substantial prejudice" might result if there was an

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[6] The following is a sample of the courts that have relied on *Kirsch* for the jurisdictional view: *In re Poskanzer*, 146 B.R. 125, 131-32 (D. N.J. 1992); *Rowland*, 275 B.R. at 215-16; *Glover*, 212 B.R. at 861; *In re Barley*, 130 B.R. 66, 69 (Bankr. N.D. Ind. 1991); *In re Booth*, 103 B.R. 800, 801-02 (Bankr. S.D. Miss. 1989).

"indefinite time" to file post-trial motions, while late objections to discharge could be raised in an answer. *Id.* 10-11. This is another version of the court's reasoning that because waiver promotes finality, Rule 4004 is waivable. Again, it does not follow that simply because waiver promotes finality in a general sense that a deadline—whether it occurs before or after judgment—is waivable.

Moreover, there is no support for what is implicit in the court's reasoning—that the policy of finality and certainty underlying Rule 9006(b)(3) is of lesser importance than that underlying Rule 6(b). Indeed, it makes little sense to suppose that the rulemakers drafted Rules 4004 and 9006(b)(3) based on the almost identical language of Rule 6(b) only to have those rules read in a way that is fundamentally different from the established meaning given to Rule 6(b). To do so would unravel the very policies of finality and certainty underlying Rules 4004 and 9006(b)(3). Further, the courts in the majority have consistently held that a debtor may neither expressly stipulate to a late objection nor implicitly waive it. *See Poskanzer*, 146 B.R. at 131-32 (even if late complaint is not raised in an answer, the Rule 4007 bar date is jurisdictional and cannot be waived); *In re Dollar*, 257 B.R. 364, 365 (Bankr. S.D. Ga. 2001) (agreed extension of time after the deadline expired was beyond court's jurisdiction to approve); *Barley*, 130 B.R. at 69 (parties may not "belatedly stipulate to waive or extend" the Rule 4007 deadline).

The court also contended that if the rule were jurisdictional, then judgments could be subject to "collateral attack after the bankruptcy court has completed its work." Pet. App. 11. The court did not explain what it meant by "collateral attack." If, however, it used the term as commonly understood—as "an attack on a judgment entered in a different

proceeding" (*Black's Law Dictionary*, 7th ed. 1999)—the reference is a "straw man." There is no collateral attack here, since petitioner raised the late objection in the same proceeding.[7] On the other hand, if the court is referring to the ability to challenge a late filing any time in the same proceeding, that would be true for any of the jurisdictional rules discussed above.

Next, the court reasoned that because Rules 4004 and 4007 allowed for discretion to enlarge the deadlines before they expired, this supported extending the deadlines after they expired. Pet. App. 11. The court stated that the ability to enlarge the time period showed that the goals of the Bankruptcy Code were "best fostered not by a rigid rule" that could be "inequitable at times and frustrate the goals of the Code." *Id.* at 12. This assertion contradicts the express language of the rule that a motion to extend "shall be filed before the time has expired." This argument also cannot be squared with the reasoning in *Taylor* or *Carlisle*. In *Taylor*, the Court recognized that under Rule 4003 the objecting party "could have asked the Bankruptcy Court for an extension of time to object" before the deadline expired. 503 U.S. at 644. Similarly, the rule at issue in *Carlisle* also allows for extensions before the deadline. *See* Rule 29(c). However, that did not make the rule any more susceptible to equitable exceptions once the deadline passed.

Finally, after eschewing the language of the rules, the court surveyed the text of the statute dealing

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[7] It is settled that if a jurisdictional issue has been litigated to judgment, then it becomes *res judicata* and is not subject to collateral attack in another proceeding. *See Ins. Corp. of Ireland v. Compaigne des Bauxites de Guinee*, 456 U.S. 694, 702, n.9 (1982). Yet that rule does not apply here (or to any of the decisions in the majority) when the late objection was raised in the same proceeding.

with bankruptcy court jurisdiction (11 U.S.C. § 157) for additional inferences. *Id.* at 12. The court attached significance to the fact that the word "timely" does not appear in the subsection listing an objection to discharge as part of the "core" jurisdiction of the bankruptcy court. *See* § 157(b)(2)(J). The court then noted that the word "timely" does appear in two other subsections—one dealing with motions to determine core jurisdiction, § 157(b)(3), and another dealing with objections in a non-core proceeding, § 157(c). *Id.* at 12-13.

Yet this attempt to divine the rulemakers' intent from where the word "timely" appears in another statute is without support from any source—either legislative history or otherwise. Further, there is little reason to attach significance to where the word "timely" appears in section 157. That section on its face does not attempt to address when an objection to discharge must be filed—that function has been specifically assigned to the rules. Therefore, to ignore the mandatory language of the rules in favor of seeking inferences from where the word "timely" appears in another statute contradicts established principles of construction.[8]

Moreover, not only are these policy reasons unconvincing, they cannot be reconciled with the express language of Rules 4004 and 9006(b)(3). Policy

[8] When the drafters actually used the word "timely" in the Advisory Committee Notes to Rule 4007, the court found this was of "marginal value." Pet. App. 13. The notes state in part: "The bankruptcy court has exclusive jurisdiction to determine dischargeability of these debts. If a complaint is not *timely* filed, the debt is discharged." (emphasis added). Contrary to the court below, this reference has been found to support the jurisdictional view. *See In re Rinde*, 276 B.R. 330, 333 (Bankr. D. R.I. 2002) (citing the same Advisory Committee Notes to find that Rule 4007 is jurisdictional).

arguments may always be raised against jurisdictional deadlines. However, as the Court emphasized in *Robinson*, such arguments do not allow unambiguous rules to be rewritten:

> That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision.

361 U.S. at 229. Again in *Carlisle*, the Court stated that it was not free to ignore the mandate of the rule "in order to obtain 'optimal' policy results." 517 U.S. at 430 (citing *Robinson*). So too, in this case, the policy arguments raised by the court below cannot override the explicit mandate of the rules and the obvious intent of the rulemakers.

D. This Case Presents No "Unique Circumstances" Exception

The jurisdictional nature of rules based on Rule 6(b) and its counterparts are not, as Justice Ginsburg noted in her concurring opinion in *Carlisle*, "utterly exceptionless":

> This Court has recognized one *sharply honed exception* to rules of the 29(c)/45(b) genre. That exception covers cases in which the trial judge has misled a party who could have—and probably would have—taken timely action had the trial judge conveyed correct, rather than incorrect, information.

517 U.S. at 1471 (Ginsburg, J. concurring) (emphasis added). This exception is referred to as the "unique circumstances" doctrine. *See Thompson v. INS*, 375 U.S.

384, 387 (1964); *see also Schneider v. Fried*, 320 F.3d 396, 403 (3d Cir. 2003) (court applies unique circumstances doctrine to allow appeal after court erroneously gave party time beyond that allowed by Rule 59).

The unique circumstances doctrine (also referred to as "extraordinary circumstances") has been used to extend the time for objecting to discharge, but only as a result of an error by the court. *See, e.g., In re Moss*, 289 F.3d 540, 542 (8th Cir. 2002) (untimely complaint allowed "due to the court's own error"); *In re Isaacman*, 26 F.3d 629, 632-33 (6th Cir. 1994) (a late objection permitted, if the court erroneously sets the wrong deadline); *In re Themy*, 6 F.3d 688, 690 (10th Cir. 1993) (out-of-time filing allowed when "creditor relies upon a bankruptcy court notice setting an incorrect deadline."). However, this narrow exception does not implicitly open up jurisdictional rules to equitable defenses such as waiver. *Leet*, 274 B.R. at 699 (the decision in *Isaacman* applying the doctrine has been "read narrowly" and applies only when the "court itself made an error"); *Rowland*, 275 B.R. at 214, n.2 (cases such as *Themy* applying unique circumstances doctrine do not mean that "waiver, estoppel and equitable tolling apply to Rule 4007(c)"); *In re Lufkin*, 256 B.R. 876, 880-81 (Bankr. E.D. Tenn. 2000) ("no court error occurred in the present case" and therefore *Isaacman* did not apply).

This case presents no unique circumstances. The bankruptcy court did not provide any incorrect or misleading information about the time for objecting to discharge. In fact, Ryan obtained three extensions of the deadline. The amended complaint that alleged the family account claim for the first time was filed almost four months after the last deadline expired. As such, there are no unique circumstances here.

CONCLUSION

The decision of the court below should be reversed.

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APPENDIX

Fed. R. Civ. P. 6(b)

Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), *except to the extent and under the conditions stated in them.*

(emphasis added).

Fed. R. Bankr. P. 9006(b)

Enlargement

(1) In general. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

(2) Enlargement not permitted. The court may not enlarge the time for taking action under Rules 1007(d), 2003(a) and (d), 7052, 9023, and 9024.

(3) Enlargement limited. The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, *only to the extent and under the conditions stated in those rules.*

(emphasis added).

Fed. R. Crim. P. 45(b)

Extending Time.

(1) In General. When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) Exceptions. The court may not extend the time to take any action under Rules 29, 33, 34, and 35, *except as stated in those rules.*

(emphasis added).

Fed. R. App. P. 26(b)

Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. *But the court may not extend the time to file:*

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(emphasis added).

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In The
Supreme Court of the United States

ANDREW J. KONTRICK,

Petitioner,

v.

ROBERT A. RYAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTION PRESENTED

Whether the 60-day period for objecting to a discharge in bankruptcy provided in Bankruptcy Rule 4004(a) is a non-jurisdictional time prescription that may be waived if not timely raised, in accord with traditional principles of equity.

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STATEMENT OF THE CASE

This matter arises out of the bankruptcy of petitioner, Dr. Andrew J. Kontrick ("Dr. Kontrick" or the "Debtor"). Respondent, Dr. Robert A. Ryan ("Dr. Ryan"), holds a judgment against the Debtor arising out of a dispute relating to their prior affiliation in a medical practice (5/6/98 Amd. Adv. Compl. at ¶¶ 41-42; 6/10/98 Answ. to Amd. Adv. Compl. at ¶¶ 41-42).

A. The Arbitration Awards Entered In Favor Of Dr. Ryan Against Dr. Kontrick.

Dr. Ryan founded a cosmetic and plastic surgery practice, which Dr. Kontrick subsequently joined, first as an employee and later as a 50% shareholder. Pet. App. 2a. Soon after becoming a shareholder, Dr. Kontrick breached the three agreements governing his professional relationship with Dr. Ryan. Pet. App. 42a. Two arbitration proceedings ensued between the doctors, both resulting in judgments in Dr. Ryan's favor. Pet. App. 2a. Dr. Ryan was awarded $47,157.81 in the first arbitration and $519,324.42, including punitive damages, in the second arbitration. *Id.* Although Dr. Kontrick satisfied the judgment entered on the first arbitration award, *id.*, he has never satisfied the judgment entered on the second award. (5/6/98 Amd. Adv. Compl. at ¶¶ 41-42; 6/10/98 Answ. to Amd. Adv. Compl. at ¶¶ 41-42).

B. Dr. Kontrick's Admissions Concerning The Purpose Behind His Transfer Of Assets And Changes In The Family Account.

Following the first arbitration, Dr. Ryan commenced a citation proceeding to discover Dr. Kontrick's assets. Pet.

App. 2a. During his deposition, Dr. Kontrick admitted that in 1992 or 1993 he removed his name from a joint checking account with his wife (the "Family Account"), from which the couple paid their expenses. Pet. App. 3a. Nevertheless, Dr. Kontrick continued to deposit his paychecks into the account in an effort to shield his assets from his creditors. *Id.* When asked about his personal finances, including the decision to remove his name from the Family Account, Dr. Kontrick admitted that the change was "prompted" by "the ridiculous maneuvers that you and your client [Dr. Ryan] have put me through in order to collect money which you don't have coming to you." Pet. App. 34a.

C. Dr. Kontrick's Chapter 7 Bankruptcy Case And Dr. Ryan's Objection To Discharge.

In April 1997, Dr. Kontrick filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Pet. App. 3a. On January 13, 1998, Dr. Ryan timely filed an adversary complaint with the bankruptcy court objecting to Dr. Kontrick's discharge (1/13/98 Adv. Compl.). The complaint sought to deny a bankruptcy discharge to Dr. Kontrick, the Debtor, pursuant to 11 U.S.C. § 727(a)(2), (3), (4), and (5), as well as a determination that Dr. Kontrick's debt to Dr. Ryan was nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (4), and (6). *Id.*[1]

[1] An individual debtor who files for bankruptcy under chapter 7 of the Bankruptcy Code may obtain a discharge of his or her pre-existing debts. *See* 11 U.S.C. § 727(a); *see also* 11 U.S.C. § 524 (specifying the effects of a discharge in bankruptcy). Section 727 prescribes the statutory grounds for the denial *in toto* of the debtor's discharge. In contrast, section 523 specifies the categories of particular debts that are

(Continued on following page)

Dr. Kontrick argues in his brief that "the complaint contained no allegations regarding the Family Account" issue and that he did not know this issue was part of the adversary proceeding until "four months after the deadline." Petitioner's Br. at 4. In fact, Dr. Kontrick's answer to the complaint contains an admission that he divested himself of assets by "taking his name off the family bank account" (2/12/98 Answ. to Adv. Compl. at ¶ 3).

Dr. Ryan thereafter sought to file an amended adversary complaint. On May 6, 1998, the bankruptcy court found that good cause existed to grant Dr. Ryan's motion and allowed the amended pleading to be filed (5/6/98 Order). At no point in his answers to the original complaint or the amended complaint did Dr. Kontrick raise an affirmative defense that the Family Account claim was not timely filed (2/12/98 Answ. to Adv. Compl.; 6/10/98 Answ. to Amd. Adv. Compl.).

excepted from the scope of the debtor's discharge. In this case, Dr. Ryan objected both to the Debtor's discharge under section 727 as well as to the discharge of the Debtor's specific obligations to him under section 523. Rule 4004(a) of the Federal Rules of Bankruptcy Procedure establishes the deadline for filing an objection to a debtor's discharge under section 727, while Rule 4007(c) establishes the relevant deadlines for filing a complaint to determine the dischargeability of individual debts under section 523.

D. The Debtor Did Not Raise The Rule 4004(a) Limitations Period Affirmative Defense Until After The Bankruptcy Court Granted Summary Judgment On The Family Account Claim.

Dr. Ryan moved for summary judgment on all counts of his amended adversary complaint. Pet. App. 4a. The bankruptcy court granted Dr. Ryan's summary judgment motion, finding that the Debtor was not entitled to a discharge under section 727(a)(2)(A) of the Code based on the Family Account claim. Pet. App. 55a. Section 727(a)(2)(A) provides that a discharge shall not be granted to a debtor who, "with intent to hinder, delay, or defraud a creditor . . . , has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the debtor, within one year before the date of the filing of the petition." 11 U.S.C. § 727(a)(2)(A).

Only after the bankruptcy court had decided the summary judgment motion in Dr. Ryan's favor did the Debtor, in a motion for reconsideration, assert the affirmative defense that the Family Account claim had not been timely filed pursuant to Bankruptcy Rule 4004(a) (3/7/00 Reconsid. Motion at 3-4).[2] The Debtor further argued that

[2] In his brief on appeal to the district court, the Debtor "piece[d] together quotes and sentences from his motion to strike" in the bankruptcy court "in an attempt to demonstrate" that even though he had not raised his objection to the timeliness of the Family Account claim in his answer to the amended adversary complaint, he had at least raised the issue in his motion to strike filed before summary judgment was granted. Pet. App. 28a. The district court rejected this contention, however, noting that the motion to strike had not raised an argument concerning the untimeliness of the Family Account claim. Pet. App. 29a (quoting Debtor's Mot. to Strike at 5).

his late assertion of the affirmative defense based on the Rule 4004(a) limitations period could not constitute waiver, claiming that the time limitation is jurisdictional (4/10/00 Reconsid. Motion Reply at 2).

The bankruptcy court denied the Debtor's motion to reconsider, reasoning that Dr. Ryan's failure to assert his Family Account claim within the time limit set by the rule was not jurisdictional and that the Debtor had waived his timeliness argument by failing to assert it prior to the entry of summary judgment. Pet. App. 72a. The remaining counts of the amended adversary complaint were dismissed as moot (6/13/00 Judgment Order at ¶ 2).

E. The District Court And Court Of Appeals Affirmed The Bankruptcy Court's Ruling That The Debtor Waived The Rule 4004(a) Affirmative Defense.

The district court affirmed the bankruptcy court's decision. Pet. App. 6a. The district court agreed that Rule 4004(a) was a limitations period rather than a jurisdictional prerequisite. Pet. App. 32a-33a. The district court also found that the Debtor had waived his Rule 4004(a) limitations period defense by failing to assert the defense in a timely manner. Pet. App. 33a.

The United States Court of Appeals for the Seventh Circuit affirmed the district court's ruling. Pet. App. 2a. Recognizing the general rule that "'[s]tatutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling,'" Pet. App. 7a (quoting *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985)), the court of appeals considered whether the deadline imposed by Rule 4004(a) constitutes an exception to this general

principle. Noting the similarities between the provisions of Rule 4004(a) and Rule 4007(c) (the latter of which provides the limitations period for filing complaints to determine the dischargeability of particular debts), the court of appeals concluded that the texts of both rules fail to supply a definitive answer, and directed its inquiry elsewhere. Pet. App. 8a-9a.

First, the court of appeals examined the role that Rules 4004(a) and 4007(c) play in determining discharge objections in bankruptcy proceedings. Observing that claims of untimeliness under both rules are affirmative defenses properly pleaded at the initial stages of a discharge proceeding, the court distinguished these rules from other procedural requirements said to impose deadlines of a jurisdictional nature at the conclusion of an action. Pet. App. 10a-11a (rejecting analogy to F.R.Civ.P. 50(b) and 6(b)). Although the court acknowledged that establishing a deadline to object to a debtor's discharge serves important bankruptcy interests, the court concluded nonetheless that "it is not at all evident that Congress intended to limit the authority of the bankruptcy court so rigidly as to preclude all relief from the time constraints of the rule." Pet. App. 11a. On the contrary, the court reasoned that a rigid interpretation of Rules 4004(a) and 4007(c) "also could be inequitable at times and frustrate the goals of the [Bankruptcy] Code." Pet. App. 12a.

Second, the court examined the jurisdictional statutes accompanying the Code. Pet. App. 12a-13a. Observing that, in certain other sections of these statutes, Congress expressly predicated the exercise of jurisdiction upon timely assertion of claims, the court concluded that Congress's failure to do so with respect to discharge objections

indicated that Congress had not intended timeliness to serve as a jurisdictional prerequisite. *Id.*

Third, the court examined the legislative history behind the rules. Pet. App. 13a. Finding this inquiry to be of "marginal assistance," the court nevertheless determined that the legislative history indicated "that some flexibility was intended by the drafters," counseling against a rigid jurisdictional construction. *Id.*

Fourth, the court examined this Court's decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), which held that the provisions of Rule 4003(b) governing the deadline for objecting to a debtor's claimed exemptions must be strictly construed and do not embrace a "good-faith" exception. Pet. App. 14a-15a. The court of appeals reasoned that *Taylor* reinforced its determination that a party waives a timeliness objection if not asserted at a proper point in the proceeding. Pet. App. 15a.

Concluding that Rule 4004(a) is not jurisdictional in nature, the Seventh Circuit then inquired whether the bankruptcy court had properly determined that the Debtor had, in fact, waived his claim. Pet. App. 16a-18a. Finding that he had, the court affirmed the judgment of the district court. Pet. App. 23a.

SUMMARY OF ARGUMENT

Bankruptcy Rule 4004(a) provides a limitations period, or time period designed to operate as a limitations period, requiring that any objection to a discharge in bankruptcy must be filed within 60 days after the first

date set for the meeting of creditors. In this case, a creditor, Dr. Ryan, commenced such an adversary proceeding challenging the Debtor's discharge. The Debtor, however, failed to raise any affirmative defense based on non-compliance with the 60-day period until after summary judgment had been entered against him.

In order to avoid operation of the traditional equitable defense of waiver resulting from his failure to timely assert such affirmative defenses, the Debtor argues that Rule 4004(a)'s limitations period should be deemed jurisdictional. In fact, the plain language of the Bankruptcy Rules, and the structure and policies of the Bankruptcy Code, demonstrate that the jurisdiction of the lower federal courts remains unaffected by Rule 4004(a) and the traditional equitable defense of waiver is available.

This Court has previously recognized the general rule that limitations periods are subject to waiver and other traditional equitable defenses. *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Moreover, this "background principle" is particularly presumed in bankruptcy, due to the equitable nature of such courts and proceedings. *Young v. United States*, 122 S. Ct. 1036, 1040-41 (2002).

Nothing in the Bankruptcy Rules suggests that the 60-day deadline in Rule 4004(a) is jurisdictional. Quite to the contrary, Bankruptcy Rule 9030 expressly states that the Bankruptcy Rules "shall *not* be construed to extend or limit the jurisdiction of the courts" (emphasis added). Moreover, the express limitations on the Court's rule-making authority in the bankruptcy context under 28 U.S.C. § 2075 demonstrates that Rule 4004(a) should not

be construed to restrict the scope of the express jurisdictional provisions of 28 U.S.C. § 157(b).

Further, the plain language of the applicable bankruptcy rules demonstrates that the doctrine of waiver remains available to bar untimely assertions of the affirmative defense premised on the 60-day period contained in Bankruptcy Rule 4004(a). Although Bankruptcy Rules 4004(b) and 9006(b)(3) expressly preclude the availability of "excusable neglect" as a defense to an untimely objection to discharge, neither rule states that traditional equitable defenses such as waiver or estoppel are abrogated. Indeed, the failure to exclude the traditional equitable defenses of waiver or estoppel plainly means that those defenses remain viable.

The Debtor attempts to draw analogies to the strict application of time limitations referenced in F.R.Civ.P. 6(b) and F.R.Crim.P. 45(b) concerning *post-judgment* proceedings. These analogies have no bearing on the application of the *pretrial* 60-day time limitation in Bankruptcy Rule 4004(a). The exceptions to such post-judgment time limits are understandably circumscribed and sharply honed due to concerns about the transfer of jurisdiction from the district court to the court of appeals and the finality of judgments. The same policy considerations, however, do not apply in the pretrial context in which Rule 4004(a) operates. In this pretrial realm, where no such competing jurisdictional issues are presented, the benefit of providing a claimant with at least one opportunity to be heard on the merits of his or her claim outweighs any arguable benefit which may flow from eliminating traditional equitable defenses.

This Court has the authority, within the statutory scheme and structure established by Congress, to prescribe rules that set deadlines for taking actions under the Bankruptcy Code, and it may therefore prescribe consequences for a party's failure to abide by a deadline. This does not suggest, however, that bankruptcy courts can or should be rendered powerless to apply traditional equitable defenses such as waiver. Because the presumption in favor of the availability of such traditional equitable defenses is "doubly true" when Congress enacts limitations periods in the bankruptcy context, it is even more compelling in the context of Court-created rules such as Bankruptcy Rule 4004(a).

ARGUMENT

I. THE AVAILABILITY OF EQUITABLE DEFENSES SUCH AS WAIVER IS PRESUMED, PARTICULARLY IN THE EQUITABLE CONTEXT OF BANKRUPTCY.

The case before the Court involves Federal Rule of Bankruptcy Procedure 4004(a), which provides as follows:

> [A] complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors . . . .

Bankruptcy Rule 4004(a) prescribes a time limit within which a creditor's right to assert any objection he or she may have to debtor's discharge in bankruptcy needs to be raised. As such, it operates as a limitations period. *Young v. United States*, 122 S. Ct. 1036, 1039 (2002) (citing 1 H. Wood, *Limitations of Actions* § 1, p. 1 (4th D. Moore ed. 1916)); *see also* Note, *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1176, 1185 (1950) (a limitations statute "prescribes time limits on the assertion of rights").

Such a limitations defense generally must be raised in an answer or other responsive pleading. *Jackson v. Rockford Hous. Auth.*, 213 F.3d 389, 392-93 (7th Cir. 2000). Rule 8(c) of the Federal Rules of Civil Procedure, applicable to adversary proceedings involving objections to a debtor's discharge under Bankruptcy Rules 4004(d) and 7008(a),[3] provides that a party "shall set forth" any "matter constituting an . . . affirmative defense," including a "statute of limitations." F.R.Civ.P. 8(c). Thus, an allegation regarding the timeliness of a discharge complaint under section 727 of the Bankruptcy Code constitutes an affirmative defense that must be raised in an answer or responsive pleading. *See, e.g., In re Kleinoeder*, 54 B.R. 33, 34-35 (Bankr. N.D. Ohio 1985), *cited with approval in In re Santos*, 112 B.R. 1001, 1008 (B.A.P. 9th Cir. 1990).

A litigant's failure to timely assert an affirmative defense that a limitations period bars the claim of his or her opponent has traditionally constituted waiver of that defense. *See, e.g., United States v. Locke*, 471 U.S. 84, 94 n.10 (1985); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Consistent with this well-established principle, the decisions rendered by the courts below

[3] Bankruptcy Rule 4004(d) provides that "[a] proceeding commenced by a complaint objecting to discharge is governed by Part VII of these rules." Part VII of the rules includes Bankruptcy Rule 7008(a), which provides that "Rule 8 F.R.Civ.P. applies in adversary proceedings. . . ."

properly recognized that the Debtor had waived the limitations period defense based on Bankruptcy Rule 4004(a) by failing to raise the affirmative defense until after summary judgment had been entered against him.

Where defenses, such as waiver, have historically been applied to the assertion of limitations periods, their availability is presumed unless the relevant statute expressly precluded such defenses. Limitations periods "are generally subject to the defenses of waiver, estoppel, and equitable tolling." *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *see also Utah v. Evans*, 536 U.S. 452, 463 (2002) ("We do not normally read into a statute an unexpressed congressional intent to bar jurisdiction that we have previously exercised."); *Am. Trucking Ass'n v. Smith*, 496 U.S. 167, 221 (1990) (Stevens, J., dissenting) (the application of a statute of limitations is "an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver"); *Braun v. Sauerwein*, 77 U.S. (10 Wall.) 218, 223 (1869) ("It seems, therefore, to be established, that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself.").

This general rule is particularly robust in the bankruptcy context. In *Young v. United States*, 122 S. Ct. 1036 (2002), this Court recognized that the availability of such defenses is presumed in a bankruptcy case. The Court held that when limitations periods are contained in a statute,

> Congress must be presumed to draft limitations periods in light of this background principle. This is doubly true when it is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and "appl[y] the principles and rules of equity jurisprudence."

Id. at 1040-41 (quoting *Pepper v. Litton*, 308 U.S. 295, 304 (1939)) (other citations omitted). If Congress is presumed to draft limitations periods in light of the well-established principle of waiver and similar equitable defenses, this presumption is even more compelling when the limitations period is contained in a Court-adopted rule such as Bankruptcy Rule 4004(a).

Notwithstanding the fact that time prescriptions seldom, if ever, expressly recognize that the limitations period can be waived, the courts regularly apply the well-recognized traditional defense of waiver. *See, e.g., Johnson v. Sullivan*, 922 F.2d 346, 355 (7th Cir. 1991) (affirming finding that 60-day period in which to obtain review of the denial of disability benefits under 42 U.S.C. § 405(g) was an affirmative defense and was waived by the HHS Secretary "because the Secretary did not raise the statute of limitations in its original answer"); *Am. Nat'l Bank v. FDIC*, 710 F.2d 1528, 1537 (11th Cir. 1983) (finding that litigant "waived its right to advance the statute of limitations defense by its failure to assert this affirmative defense in any pleading filed below in compliance with F.R.Civ.P. 8(c)"); *cf. New York v. Hill*, 528 U.S. 110, 114 (2000) (affirming that a criminal defendant's attorney waived his client's right to a trial within 180 days under the provisions of the Interstate Agreement on Detainers based on the attorney's agreement to a delay in commencing the trial until after the period had run, despite the lack of any provision in the subject interstate compact "prescrib[ing] the effect on a defendant's assent to delay on the applicable time limits"). Such rulings comport with the

traditional and pervasive view that a "statute of limitations is a personal defense." Note, *Developments in the Law: Statutes of Limitations* 63 Harv. L. Rev. 1177, 1233 (1950); *see also* 1 H. Wood, *Limitations of Actions* § 41 (4th D. Moore ed. 1916) ("The plea of the statute of limitations is generally a personal privilege, and may be waived by a defendant . . . at his election.").

In short, absent some basis for holding Rule 4004(a)'s limitations period to be jurisdictional, claimed violations of the 60-day restriction set forth in Rule 4004(a) are properly subject to the equitable defense of waiver, if not timely raised.

II. THE 60-DAY TIME LIMITATION UNDER BANKRUPTCY RULE 4004(a) IS NOT JURISDICTIONAL.

Nothing in the text of Bankruptcy Rule 4004(a) provides that this deadline is jurisdictional. Although the deadline must be taken seriously, it should not be construed to constitute a jurisdictional requirement – a holding that would contravene the text of the rules and the structure of the governing statutory scheme.

A. The Text Of The Rule And Structure Of The Statutory Scheme Demonstrate That The Jurisdiction Of The Lower Federal Courts Is Not Affected By Rule 4004(a).

Article III, section 1 of the Constitution grants Congress the power to determine the jurisdiction of the lower federal courts. Congress has, pursuant to 28 U.S.C. §§ 1334 and 157, prescribed the jurisdiction of the federal courts in bankruptcy matters. *See Fed. Power Comm'n v. Pacific Power & Light Co.*, 307 U.S. 156, 159 (1939) ("Congress determines the scope of the jurisdiction of the lower federal courts."). Under Congress's scheme, the district courts exercise jurisdiction over all civil proceedings arising under the Bankruptcy Code, as well as all proceedings arising in or related to bankruptcy cases. 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157(a), this jurisdiction is further delegated to federal bankruptcy judges, who are authorized under section 157(b)(1) to enter final orders in all "core proceedings arising under [the Bankruptcy Code], or arising in a case under [the Code]."[4]

Under 28 U.S.C. § 157(b)(2), core proceedings specifically include "determinations as to the dischargeability of particular debts" as well as "objections to discharge." 28 U.S.C. § 157(b)(2)(I) & (J). Significantly, nothing in section 157(b) limits the jurisdiction of the bankruptcy courts over discharge objections based on the timeliness of the objection.

The absence of any timeliness prerequisite under section 157(b) stands in stark contrast to other provisions of sections 1334 and 157 that do incorporate specific timeliness requirements. For example, section 1334(c)(2), governing mandatory abstention in bankruptcy proceedings, expressly provides for abstention "[u]pon *timely* motion of a party in a proceeding." 28 U.S.C. § 1334(c)(2) (emphasis added). Similarly, section 157(c), governing the jurisdiction of the bankruptcy courts over proceedings that

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[4] Pursuant to 28 U.S.C. § 151, federal bankruptcy judges in each district "constitute a unit of the district court to be known as the bankruptcy court for that district."

are not "core" bankruptcy matters, but are otherwise "related to" a bankruptcy case, provides that the decisions of bankruptcy courts in these proceedings are subject to *de novo* review in the district courts, but only with respect to "those matters to which any party has *timely* and specifically objected." 28 U.S.C. § 157(c)(1) (emphasis added).

These provisions demonstrate that, where Congress intends to require the timeliness of a particular action in a bankruptcy case to be jurisdictional, it does so expressly. Conversely, Congress's decision to omit any timeliness requirement in establishing the bankruptcy court's jurisdiction over discharge proceedings demonstrates the absence of any intent to create such a prerequisite. *See Toibb v. Radloff*, 501 U.S. 157, 161 (1991) (refusing to infer limitation on bankruptcy eligibility, stating "Congress knew how to restrict recourse to the avenues of bankruptcy relief"); *Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991) (refusing to infer exception to bankruptcy relief, concluding that express exceptions precluded inference of additional exceptions); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984); *see also Bates v. United States*, 522 U.S. 23, 29-30 (1997) (it is "generally presumed that Congress acts intentionally" in the "disparate inclusion or exclusion" of particular language).

Nor may the Bankruptcy Rules be construed to superimpose a jurisdictional limitation where none is provided or intended in the governing statutory scheme. First, the Bankruptcy Rules themselves preclude such a construction. Bankruptcy Rule 9030 expressly acknowledges that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts." The term, "jurisdiction" as used in Rule 9030 refers to the "subject matter jurisdiction of the district and bankruptcy courts." 10 *Collier on Bankruptcy* ¶ 9030.01 (15th ed. 2003). Under Rule 9030, the deadline set by Rule 4004(a) cannot be construed to restrict in any way the subject matter jurisdiction of the district and bankruptcy courts over discharge matters.[5]

Moreover, the authority to adopt procedural bankruptcy rules is governed by 28 U.S.C. § 2075, which vests this Court with the power "to prescribe by general rules, the forms of process, writs, pleading, and motions, and the practice and procedure in cases under [the Bankruptcy Code]." 28 U.S.C. § 2075. Importantly, however, section 2075 further provides that "[s]uch rules shall not abridge, enlarge, or modify any substantive right." *Id.*[6] By way of comparison, the Rules Enabling Act, 28 U.S.C. § 2072, authorizing this Court to adopt rules governing the practice and procedure in the district courts and courts of appeals outside the bankruptcy context, provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C.

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[5] The term "jurisdiction" refers to "the courts' statutory or constitutional *power* to adjudicate the case." *United States v. Cotton*, 122 S. Ct. 1781, 1785 (2002) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)). In general, it "is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction.'" *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring).

[6] As amended in 1978, section 2075 discontinued and proscribed the former practice under the Bankruptcy Act of 1898 of promulgating procedural rules in bankruptcy that superceded conflicting laws, including provisions of the Act. *See* 9 *Collier on Bankruptcy* ¶ 1001.02 at 1001-04 (15th ed. 2003). Prior to its amendment in 1978, section 2075 authorized the adoption of bankruptcy rules similar to the authorization currently found in 28 U.S.C. § 2072 governing the promulgation of general rules of civil procedure. *See id.*

§ 2072(b). No such provision is contained in section 2075. This statutory scheme denotes that "the Bankruptcy Rules are rules only, having no statutory effect, and that the time for filing a complaint objecting to discharge is not jurisdictional." *In re Dombroff*, 192 B.R. 615, 621 (S.D.N.Y. 1996) (holding that the time period fixed by Bankruptcy Rule 4004(a) is not jurisdictional).

When considering the "jurisdictional" nature of rules adopted under a broad statutory grant from Congress, "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." *Schacht v. United States*, 398 U.S. 58, 68 (1970). Contrary to this authority, the Debtor's argument that Rule 4004(a) implicitly curtails the jurisdiction of a bankruptcy court to adjudicate an objection to discharge on the grounds of untimeliness improperly construes a rule to "abridge" or "modify" a substantive right. In this case, Dr. Ryan objected to the Debtor's discharge under section 727(a)(2)(A) of the Bankruptcy Code. 11 U.S.C. § 727(a)(2)(A). As the Code provides, he was entitled to do so under section 727(c)(1) (stating that "a creditor . . . may object to the granting of a discharge under subsection (a)").[7] The bankruptcy court possessed jurisdiction over his objection pursuant to 28 U.S.C. § 157(b), and nothing in any of these provisions eliminates the court's jurisdiction or power to adjudicate

[7] There is no dispute that Dr. Ryan is a "creditor" for purposes of this statutory provision. "Creditor" is defined as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10).

his objection even if he presented one of his allegations beyond the deadline set forth in the rule.

This Court has the authority to prescribe rules that set deadlines for taking actions under the Bankruptcy Code, and may prescribe consequences for a party's failure to abide by a deadline, including the denial of otherwise available relief. But it is one thing to set a deadline for the filing of objections in order to regulate the administration of the debtor's discharge; it is something else entirely to interpret that deadline in a manner that would render the bankruptcy court powerless to entertain an untimely objection under well-recognized principles such as waiver. Bankruptcy rules cannot curtail the court's jurisdiction, where the governing jurisdictional provisions do not themselves recognize or require any such limitation.

Given the express restrictions on the Court's rule-making authority in 28 U.S.C. § 2075, this Court should not construe Rule 4004(a) to restrict the scope of the express jurisdictional provisions of 28 U.S.C. § 157(b). Rule 4004(a) is not jurisdictional and thus, like ordinary limitations periods, should be subject to the established defense of waiver. *See Zipes v. Trans World Airlines, Inc.*, 45 U.S. 385, 393, 395 n.12 (1982) (concluding in a Title VII discrimination case that "filing a timely charge . . . is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver" and noting this Court's tendency, in discussing such time periods, to "us[e] the limitations label to the exclusion of the jurisdictional label").

B. The Non-Jurisdictional Nature Of Bankruptcy Rule 4004(a) Is Further Established By The Rule's Failure To Implement Any Of The Bankruptcy Code's Jurisdictional Provisions.

That Bankruptcy Rule 4004(a) does not implement any of the Bankruptcy Code's jurisdictional provisions further corroborates the rule's non-jurisdictional nature. As the Advisory Committee Note to the rule explains, Rule 4004(a) implements section 727 of the Bankruptcy Code. Advisory Committee Notes to Rule 4004 ("Subdivisions (a) and (b) of this rule prescribe the procedure for determining whether a discharge will be granted *pursuant to § 727 of the Code*.") (emphasis added). Although section 727 governs the right of a creditor to object to a debtor's discharge, that section does not prescribe the jurisdiction of the bankruptcy court to adjudicate the creditor's objection, which is instead covered by 28 U.S.C. § 157(b), as set forth above.

Even those rules which do implement various provisions of the bankruptcy jurisdictional statutes, including the two provisions discussed previously that contain *express* timeliness requirements – 28 U.S.C. § 1334(c)(2), governing abstention matters, and 28 U.S.C. § 157(c)(1), governing *de novo* review of "non-core" proceedings – are not jurisdictional. For example, Bankruptcy Rule 9033(b) implements the timeliness requirement of 28 U.S.C. § 157(c)(2) by requiring that objections to a bankruptcy court's proposed findings of fact are timely if filed within 10 days after being served with a copy of the court's findings, but that rule is not jurisdictional.

The Advisory Committee Note to Rule 9033(b) states that the rule is patterned after Rule 72(b) of the Federal

Rules of Civil Procedure, a provision governing objections to the recommended findings of magistrate judges. In turn, Rule 72(b) implements 28 U.S.C. § 636(b)(1)(C). Generally speaking, a party who fails to timely object to a magistrate judge's proposed factual findings may be deemed to have waived any right to object, as well as any right to subsequent review of the judge's factual determinations in the district court. *See Thomas v. Arn*, 474 U.S. 140, 147-48 (1985) (construing circuit court rule implementing timeliness requirement). Nevertheless, because the timeliness requirement is not jurisdictional, it does not preclude the district court's exercise of jurisdiction to review the matter, or its ability to excuse an untimely objection. *See id.* at 155 ("because the rule is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interests of justice"); *Kruger v. Apfel*, 214 F.3d 784, 786-87 (7th Cir. 2000); 14 *Moore's Federal Practice* § 72.11[2][b] (3d ed. 2003).

Because Rule 9033(b) is patterned after Rule 72(b), courts have construed it synonymously. *See, e.g., Nantahala Village, Inc. v. NCNB Nat'l Bank*, 976 F.2d 876, 879-80 (4th Cir. 1992); *see also* 10 *Collier on Bankruptcy* ¶ 9033.10 at 9033-10-11 (15th ed. 2003). But if Rule 9033(b) is not jurisdictional even though it implements the express timeliness requirement of a bankruptcy jurisdictional statute, it follows that Rule 4004(a) also cannot be jurisdictional because it does not implement either a jurisdictional provision or any express statutory requirement of timeliness.[8]

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[8] Similar to Bankruptcy Rule 9033(b), Bankruptcy Rule 5011(b) implements the provisions of 28 U.S.C. § 1334(c) governing abstention in bankruptcy cases. Although Rule 5011(b) prescribes certain

(Continued on following page)

C. The Equitable Nature Of The Bankruptcy Courts And Section 105 Of The Bankruptcy Code Further Demonstrate That The Defense Of Waiver May Be Applied To The Time Limitation Contained in Bankruptcy Rule 4004(a).

Bankruptcy courts are equitable tribunals that apply equitable principles. *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934) ("courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity"); *see also Young v. United States*, 122 S. Ct. 1036, 1040 (2002) ("bankruptcy courts [are] courts of equity and 'appl[y] the principles and rules of equity jurisprudence' ") (quoting *Pepper v. Litton*, 308 U.S. 295, 304 (1939)); *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990) ("bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships"); H.R. Rep. No. 95-595, at 359 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6315 (stating that, under the Bankruptcy Code, "[t]he bankruptcy court will remain a court of equity") (citing *Local Loan Co.*, 292 U.S. at 240).

Congress has expressly recognized the equitable powers of the bankruptcy courts to issue "any order . . . that is necessary or appropriate to carry out the provisions

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requirements for the filing of abstention motions, it does not specify a time limit. Instead, the timeliness of the motion is left for resolution on a case-by-case basis. *See, e.g., In re Fulfer*, 159 B.R. 921, 922 (Bankr. D. Idaho 1993) (abstention motion filed four months after removal of action was timely where, among other reasons, debtor did not object that it was untimely); *Robinson v. Michigan Consol. Gas. Co.*, 918 F.2d 579, 584 (6th Cir. 1990) (abstention motion filed eight months after removal was untimely).

of" the Bankruptcy Code. 11 U.S.C. § 105(a). "These statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *Energy Res. Co.*, 495 U.S. at 549.

It is the equitable nature of bankruptcy proceedings and the status of bankruptcy courts as equitable tribunals that render the general rule, that limitations periods are generally subject to waiver and other traditional equitable defenses, "doubly true" in the bankruptcy context. *Young*, 122 S. Ct. at 1040-41. Of course, equitable principles will not prevail to the extent "inconsistent with the text of the relevant statute." *Id.* at 1040 (quoting *United States v. Beggerly*, 524 U.S. 38, 48 (1998)). In this case, however, no textual provision intervenes to defeat application of the strong presumption that the principle of waiver is an available doctrine in this case. Like most other rules governing pretrial procedure, Bankruptcy Rule 4004(a) establishes a purely non-jurisdictional limitations period. Accordingly, it is properly subject to the traditional equitable principle of waiver.

III. THE DEBTOR'S ARGUMENTS FAIL TO DEMONSTRATE ANY ABROGATION OF THE TRADITIONAL EQUITABLE DEFENSE OF WAIVER.

A. The Plain Language Of The Bankruptcy Rules Demonstrates That The Doctrine Of Waiver Is Applicable To Untimely Assertions Of The Affirmative Defense Premised On The 60-Day Period Contained In Rule 4004(a).

The Debtor argues that Rule 4004(a) must be jurisdictional in nature because the deadline it establishes is a

strict one. As support for this argument, the Debtor observes that, under Rule 9006(b)(3), a litigant may not claim "excusable neglect" as a reason for failing to comply with the deadline set forth in Rule 4004(a). He further observes that, pursuant to Rule 9006(b)(3), a litigant may only extend the time for filing discharge objections set by Rule 4004(a) in accordance with the provisions of Rule 4004(b).

In fact, the plain language of the applicable bankruptcy rules does not support the Debtor's jurisdictional argument, demonstrating instead that the doctrine of waiver remains applicable to untimely assertions of the affirmative defense premised on the 60-day period contained in Rule 4004(a). While it is true that Rules 4004(b) and 9006(b)(3) restrict the grounds on which a party may seek an extension of the deadline, careful attention must be paid to what these rules do not say. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947) ("One must also listen attentively to what [the statute] does not say."). As with statutes, Court-adopted rules are to be given their plain meaning. *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 123 (1989) (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980)).

No ambiguity exists in Rules 4004(a) and 9006(b). Neither rule states that its time limitations provision is jurisdictional. More importantly, neither states that, beyond excusable neglect, other defenses such as waiver or estoppel are eliminated. The defense of excusable neglect to the operation of a time deadline "entails . . . an equitable inquiry." *Pioneer Inv. Serv. Co. v. Brunswick Ass'n Ltd. P'ship*, 507 U.S. 380, 389 (1993). As a result, the canon *expressio unius est exclusio alterius* – the expression of one

item of an associated group excludes another left unmentioned, *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) – further supports the conclusion that the failure to mention the unavailability of other traditional equitable defenses such as waiver or estoppel demonstrates that the rules did not abrogate their application in proper circumstances. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (applying the canon of construction in support of holding that F.R.Civ.P. 9(b) does not require the pleading of municipal liability claims under 42 U.S.C. § 1983 with particularity because it is not one of the matters enumerated in the rule); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (applying the same canon of construction in support of holding that employment discrimination claims "must satisfy only the simple requirements of Rule 8(a)" of the Federal Rules of Civil Procedure).

Indeed, it is highly unlikely that the drafters would have intended to eliminate traditional defenses such as waiver and estoppel. As discussed above, these traditional defenses have long been a part of equitable jurisprudence. If the drafters intended to exclude these defenses, they would have done so expressly. Although the rules explicitly preclude a creditor from seeking relief due to excusable neglect, they do not expressly or impliedly abrogate the equitable doctrine of waiver, which is a different equitable concept that focuses on the debtor's failure to timely raise the issue, rather than on the reasons for the creditor's late assertion of his claim.

As a result, both the plain language of Bankruptcy Rules and traditional equitable considerations support the conclusion that Dr. Ryan's assertion of the defense of

waiver to an untimely assertion of a discharge objection was not barred by Rules 4004 or 9006(b)(3).

B. The Bankruptcy Code And The Policies Underlying The Code Further Support Application Of Waiver.

The statutory scheme and policies embodied in the Bankruptcy Code also demonstrate that the traditional defense of waiver has not been abandoned. Nevertheless, the Debtor asserts that ignoring his waiver of the limitations defense would promote the policy of affording debtors a "fresh start." It is true, of course, that bankruptcy law has long embraced a fresh start concept. But since the Nation's first bankruptcy law, it has equally been true that discharge relief has always been limited to the "honest but unfortunate debtor." *See Brown v. Felsen*, 442 U.S. 127, 128 (1979) ("By seeking discharge, however, respondent placed the rectitude of his prior dealings squarely in issue, for, as the Court has noted, the Act limits that opportunity to the 'honest but unfortunate debtor.'"); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45 (1934) ("One of the primary purposes of the Bankruptcy Act is to relieve the *honest* debtor from the weight of oppressive indebtedness, and permit him to start afresh.") (emphasis added); *McIntyre v. Kavanaugh*, 242 U.S. 138, 142 (1916) ("It was an honest debtor, and not a malicious wrongdoer, that was to be discharged."); *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904).

Although most debtors seeking bankruptcy relief clearly fit the paradigm of the "honest but unfortunate debtor," on occasion there are those who do not. Recognizing this, the drafters of Rule 4004(a) would not likely have intended to foreclose all ability to relieve creditors from the deadline that it establishes. Instead, it is far more likely that the drafters intended to foreclose only that which they expressly foreclosed, namely, relief on grounds of excusable neglect.

The Debtor's jurisdictional construction is further undercut by reference to Bankruptcy Rule 1001 and the long-established principle that a party's failure to raise an adversary's untimeliness constitutes a waiver of the argument. The timely pleading of affirmative defenses based on limitations periods ultimately serves the purposes of "secur[ing] the just, speedy, and inexpensive determination of every case and proceeding." F.R.Bankr.P. 1001. This admonition is consistent with the guiding principle of the "prompt and effectual administration" of federal bankruptcy law as a whole. *Katchen v. Landy*, 382 U.S. 323, 328 (1966).

The Debtor suggests that efficiency is best served by curtailing the ability of creditors to pursue untimely discharge objections. But it is also served at least as well by the rule that arguments over untimeliness must be raised by a debtor before the conclusion of litigation over a debtor's right to a discharge. If the deadline in Rule 4004(a) were truly jurisdictional, the untimeliness of an objection could be raised at any time, even on appeal. As the court of appeals suggested, the Debtor's argument would vastly expand the ability of litigants, having failed to properly raise their defenses in the trial court, to raise them for the first time even on appeal. Pet. App. 11a. Thus, treating Rule 4004(a) as a jurisdictional deadline does not promote finality or fairness.

If Bankruptcy Rule 4004(a) is held to be jurisdictional, then it is difficult to understand why most other procedural rules that establish strict deadlines are not also

"jurisdictional." Indeed, the Debtor offers no principled basis upon which to distinguish Rule 4004(a) from many other time limitations that are not jurisdictional and therefore are subject to traditional equitable defenses such as waiver. If all of these limitations periods are deemed "jurisdictional," then a creditor's failure to timely assert a claim or objection may be raised by the debtor at any time during the litigation on jurisdictional grounds – thereby ensuring repetition in future cases of a debtor's failure to properly plead the limitations defense until he or she chooses. If not barred by waiver, a debtor could save that argument for post-judgment motions or appeal if his or her other arguments fail. Allowing a debtor to hold that procedural issue in strategic reserve, which would be an option if waiver were not available, would not advance finality or judicial efficiency. Recognition of these facts further demonstrates that the traditional doctrine of waiver, where properly applied, effectively promotes efficiency and justice.

C. The Policies Applicable To The Time Limits Governing Post-Judgment Matters Differ From Those Applicable To Pretrial Proceedings.

The Debtor argues that because some time deadlines contained in certain *post-judgment* rules "may not be altered by equitable defenses, . . . [t]he same may be said for Rules 4004 and 9006(b)." Petitioner's Br. at 8. In fact, the time limitation contained in Bankruptcy Rule 4004 operates in the very different *pretrial* context where a party has not yet had an opportunity to be heard – a context in which materially different policy considerations are implicated.

As noted by the Debtor, the Advisory Committee Note to Bankruptcy Rule 9006(b) states that the rule is patterned on Rule 6(b) of the Federal Rules of Civil Procedure. That rule prohibits the enlargement of time for any act under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b) of the Federal Rules of Civil Procedure, "except to the extent and under the conditions stated" in the rules themselves. F.R.Civ.P. 6(b). Each of these affected rules, however, involves limitations periods in the context of post-judgment proceedings.[9] In contrast, Rule 4004(a) operates in the pre-judgment context.

The Debtor also points to F.R.Crim.P. 45(b), a rule likewise modeled on F.R.Civ.P. 6(b). Again, he attempts to analogize the relevant Bankruptcy Rules to this post-trial context, pointing to language in *United States v. Robinson*, 361 U.S. 220 (1960), that it "must be presumed" that the Court knew of the construction of F.R.Civ.P. 6(b) as "mandatory and jurisdictional" when F.R.Crim.P 45(b) was adopted.[10] Petitioner's Br. at 18 (quoting *Robinson*, 361

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[9] F.R.Civ.P. 50(b) requires the filing of a renewed motion for judgment as a matter of law within 10 days after the judgment was entered. F.R.Civ.P. 52(b) requires a motion to amend findings of fact to be filed within 10 days. F.R.Civ.P. 59(b), (d) and (e) provide time limits for filing motions for a new trial or to alter or amend the judgment. F.R.Civ.P. 60(b) provides the time limits for obtaining relief from a judgment.

[10] F.R.Crim.P. 45(b) provides that the courts "may not extend the time for taking any action under [F.R.Crim.P.] 29, 33, 34 and 35, except to the extent and under the conditions stated in them." Each of these rules addresses post-verdict actions. A motion for acquittal under F.R.Crim.P. 29(c), a motion for a new trial under F.R.Crim.P. 33, and a motion for arrest of judgment under F.R.Crim.P. 34 must be made within seven days *after* verdict or a finding of guilt, or within such further time as the court may fix during the seven-day period. A motion

(Continued on following page)

U.S. at 229). What the Debtor fails to discuss or appreciate is that the "mandatory and jurisdictional" nature of those rules is directly tied to the post-judgment or appellate context in which they operate. *See, e.g., Robinson*, 361 U.S. at 229 ("The courts have uniformly held that the *taking of an appeal* within the prescribed time is mandatory and jurisdictional.") (emphasis added).

Post-judgment limitations periods such as those referenced in F.R.Civ.P. 6(b) and F.R.Crim.P 45(b) have two major functions. First, they allocate decision-making authority between the district court and court of appeals, determining when jurisdiction over the case moves from the district court to the appellate court – a point in time that must be without doubt in order for the judicial system to work effectively and efficiently. *Bailey v. Sharp*, 782 F.2d 1366, 1368 (7th Cir. 1986); *Rector v. Approved Fed. Sav. Bank*, 265 F.3d 248, 252-53 (4th Cir. 2001). Second, post-judgment time limits set a definite point in time at which judgments become final. *Mendes Junior Int'l Co. v. Banco Do Brasil, S.A.*, 215 F.3d 306, 314 (2d Cir. 2000); *Rector*, 265 F.3d at 253.[11]

On the other hand, as the Seventh Circuit recognized in this case, Bankruptcy Rule 4004(a) applies in the pretrial context, "before any adjudication has taken place."

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for reduction of sentence under F.R.Crim.P. 35 must be made within 120 days after appellate proceedings are ended.

[11] The Court in *Robinson*, further noted that mitigation of the time limits applicable to post-verdict proceedings in criminal matters "seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights." *Id.* at 230 n.14.

Pet. App. 10a. Issues concerning the allocation of judicial business and the finality of judgments are not implicated. In the pre-judgment context, when the claimant has not yet had his or her day in court, different policy considerations are brought to bear on limitations periods. Indeed, the purpose of waiver and other equitable defenses to time limits "is to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court." *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1137 (9th Cir. 2001) (applying California law and quoting *Addison v. California*, 21 Cal. 3d 313, 316, 578 P.2d 941, 942 (1978)).

Similarly, in *Utah v. Evans*, 536 U.S. 452 (2002), this Court rejected the argument that a statute authorizing lawsuits commenced prior to the conclusion of the census implicitly forbade the State of Utah's lawsuit challenging a certain statistical method after completion of the census. The Court noted that the statute "does not explain why Congress would have wished to deprive [a State] of its day in court." *Id.* at 463. *See also Richards v. Jefferson County*, 517 U.S. 793, 803 (1996) ("Because the guarantee of due process is not a mere form, . . . [a] category of taxpayer cases [exists] in which the State may not deprive individual litigants of their own day in court."); *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (recognizing that due process concerns protects a litigant's "right to his day in court").

The policy of avoiding a construction of statutes and rules that would deprive litigants of their day in court is undoubtedly why, "[t]raditionally, courts have treated statutes of limitations and prescriptions designed to operate as statutes of limitations as flexible, *i.e.*, 'subject to waiver, estoppel, and equitable tolling.'" *AFL-CIO v. OSHA*, 905 F.2d 1568, 1570 (D.C. Cir. 1990) (citing *Zipes v.*

Trans World Airlines, 455 U.S. 385, 393 (1982)). Indeed, as previously noted, that the untimely assertion of a limitations defense constitutes waiver of that defense is nothing more than a specific application of the general rule that affirmative defenses that are not pleaded are waived. The "failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." 5 Wright & Miller, *Federal Practice and Procedure*, Civil § 1278 (2d ed. 1990). For example, in *Venters v. City of Delphi*, 123 F.3d 956, 967-68 (7th Cir. 1997), the court found that a statute of limitations defense was waived where the defendant did not mention the defense until the reply brief in support of summary judgment.

Although courts have discretion in determining under what circumstances a defendant's failure to timely raise an affirmative defense should constitute waiver, a finding of waiver can seldom, if ever, be avoided *after* summary judgment has been granted. For example, in *United States v. Mason Tenders Dist. Council*, 909 F. Supp. 882 (S.D.N.Y. 1995), the defendants in an ERISA case sought to raise a statute of limitations defense after partial summary judgment had been entered against them. The court properly refused because the defendants "had ample opportunity to raise a statute of limitations defense" and Rule 8(c) "dictates that their failure to do so constitutes a waiver of the defense." *Id.* at 891. This holding comports with the general rule's goal of fostering finality by recognizing the waiver of limitations defenses that are not timely asserted.

The Debtor's argument that an affirmative defense based on the time limitation in Rule 4004(a) cannot be waived, despite his failure to plead the affirmative defense, would render Rule 7008(a)'s requirement of pleading affirmative defenses a nullity. Rules 4004 and 7008 are

rules *in pari materia* that should be construed and harmonized to the extent possible. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) (holding that courts should construe statutes to foster harmony with other statutes); *see also Marek v. Chesney*, 473 U.S. 1, 21 (1985) (Brennan, J., dissenting) (Federal Rules should be read *in pari materia* because to "do otherwise would 'attribute a schizophrenic intent to the drafters'").

This issue also raises fairness considerations. If a creditor fails to timely assert his objection to the debtor's discharge and the debtor timely raises that defense, the creditor would lose the opportunity to have his or her objection heard on the merits, even if his failure to timely object was due to excusable neglect. On the other hand, if the creditor asserts his objection late, but the debtor fails to timely assert that defense, then the limitations defense should be waived and the creditor's objection to the debtor's discharge should be heard on the merits. In other words, if both parties fail to comply with the timeliness requirements of Rules 4004(a) and 7008, then the only consequence is that the merits of the discharge objection would be heard. This consequence is certainly not bad and generally should lead to the most just result. Moreover, allowing for waiver promotes evenhandedness – if both parties fail to act timely, then neither party should be able to secure an advantage in the case. Permitting a claim to be heard and determined on the merits is a legitimate and valued goal of our judicial system.

Finally, any departure from the application of the principle of waiver premised on a reading of Bankruptcy Rule 4004(a)'s time limit as jurisdictional – despite the defense having first been raised after entry of summary judgment – would have the undesirable effect of undermining

finality. The decision would be subject to collateral attack even after a hearing and decision on the merits. As the court of appeals noted,

> the doctrine of waiver . . . requires parties to put all of their arguments before the appropriate court at the appropriate time for a full resolution of their claims. . . . [P]arties are prompted to action and finality is served by our conclusion that parties may waive any objection to the untimeliness of a creditor's complaint if the objection is not raised at the proper time.

Pet. App. 15a-16a.

For these reasons, the Debtor's comparison to certain strictly construed post-judgment time limitations fails to support his argument that the pre-judgment limitations period contained in Rules 4004 should be treated as jurisdictional.

D. The Debtor's Reliance On The *Taylor* and *Carlisle* Decisions Is Misplaced.

The Debtor argues that the Court's decisions in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), and *Carlisle v. United States*, 517 U.S. 416 (1996), "reinforce the conclusion that the plain meaning of Rule 4004 does not allow for equitable exceptions." Petitioner's Br. at 19. As noted above, however, the plain language of the statute actually demonstrates that Rule 4004(a) precludes application only of the "excusable neglect" defense. The plain language does not purport to bar other traditional equitable defenses. Nor does it demonstrate that the Rule 4004 is jurisdictional. In fact, neither *Taylor* nor *Carlisle* addressed with the key fact

in this case: a defendant's undisputed waiver of the claimant's failure to comply with a limitations period. These decisions do not hold or suggest that a finding of waiver would be inappropriate in such a situation.

Nothing in *Taylor* establishes the Debtor's point. The Debtor claims that this Court held in *Taylor* that the Rule 4003(b) limitations period for objecting to a debtor's listing of property exempt from the bankruptcy estate "was mandatory and could not be extended on equitable grounds, even for a claim not made in good faith." Petitioner's Br. at 7. This description mischaracterizes the holding in *Taylor*. First, the Court never describes the limitations period as "jurisdictional" or "mandatory." On the contrary, the Court held that the debtor's *timely* assertion of the untimeliness of the exemption objection was proper. In *Taylor*, the debtor (or more precisely, the debtor's counsel) did not wait until after the rendering of an adverse decision denying the exemption to raise the Rule 4003(b) limitations period defense; instead, the objection was raised before any hearing or adjudication of the merits had occurred.

In fact, the decision in *Taylor* did not address waiver or any other traditionally recognized equitable defenses routinely applied in bankruptcy. That the Court in *Taylor* refused to adopt a new "good faith exception" that would overcome the Rule 4003(b) limitations period defense certainly cannot be understood to mean that waiver and other traditional equitable defenses are unavailable as a matter of law. The trustee in *Taylor* was trying to create a new equitable doctrine, something this Court has expressly stated it is unwilling to do. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308,

332 (1999) ("the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence"). Moreover, the Court expressly declined to consider section 105's effect on that argument because the argument had been waived due to the failure to raise it in the lower court. *Id.* at 645-46. As Justice Stevens noted in his dissent in *Taylor*, the Court did not hold that it lacks the authority to apply the traditional doctrine of equitable tolling to the 30-day period in Rule 4003(b) in an appropriate case. *Id.* at 646 (Stevens, J., dissenting).

Indeed, even if one of the traditional equitable defenses were deemed unavailable, such a ruling would not mean that the others are also barred. These doctrines or defenses are not fungible. The decision in *In re Santos*, 112 B.R. 1001 (B.A.P. 9th Cir. 1990), demonstrates that the unavailability of one equitable defense does not signify that other equitable defenses would likewise fail. After concluding that the time limits in Bankruptcy Rules 4004(a) and 4007(c) are not jurisdictional, the court in *Santos* found that equitable tolling was not available because the running of the 60-day period in these rules "is not dependent on the discovery or accrual of a cause of action as it would be in a statute to which tolling is more appropriately applied." *Id.* at 1006. Nonetheless, the court in *Santos* recognized the continuing viability of the waiver defense, remanding the case to the bankruptcy court for a determination on the waiver issue. *Id.* at 1008-09.

Similarly, the decision in *Carlisle v. United States*, 517 U.S. 416 (1996), fails to supports the Debtor's argument in this case. As in the *Taylor* decision, the Court in *Carlisle* held that the Government's *timely* objection to the untimeliness of the motion – in this case, a motion for judgment of

acquittal under F.R.Crim.P. 29(c) – precluded consideration of the motion[12]. No issue of waiver was involved in *Carlisle*: the Government did not wait until after the district court had considered the merits of the motion to raise its limitations defense.

As the Court recognized in *Carlisle*, the case did not involve the abrogation of established principles, such as the traditional equitable doctrine of waiver or the scope of a court's inherent power:

> In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991), we said that we would not "'lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power," *id.*, at 47 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). Similarly, in *Link v. Wabash R. Co.*, 370 U.S. 626, 629-632 (1962), we said that since a district court's authority to dismiss *sua sponte* for lack of prosecution was a "sanction of wide usage," we would not assume, in the absence of a clear expression, that Federal Rule of Civil Procedure 41(b), which allowed a party to *move* for dismissal for lack of prosecution, abrogated this "long . . . unquestioned" power. That cautionary principle does

[12] F.R.Crim.P. 29(c) states: "MOTION AFTER DISCHARGE OF JURY. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

> not apply in the present case, not only because of the clarity of the text, but also because we are unaware of any "long unquestioned" power of federal district courts to acquit for insufficient evidence *sua sponte*, after return of a guilty verdict.

Id. at 426 (emphasis original).

In this case, however, holding that Rule 4004(a) bars application of the traditional doctrine of waiver on jurisdictional grounds would be a "depart[ure] from established principles," *id.*, because this equitable defense is presumptively available, particularly in bankruptcy proceedings. *See Young v. United States*, 122 S. Ct. 1036, 1040-41 (2002).

Moreover, even in this post-verdict context, the time prescription of F.R.Crim.P. 29(c) cannot be deemed jurisdictional because its application is not "utterly exceptionless." *Carlisle*, 517 U.S. at 435-36 (Ginsburg, J., concurring) (noting that the "sharply honed exception to rules of the 29(c)/45(b) genre" was not implicated because "Carlisle's counsel was not misled by any trial court statement or action").

That the exception to F.R.Crim.P. 29(c) is "sharply honed" should be expected, given the post-verdict context in which F.R.Crim.P. 29(c) operates. In that context, this Court did not allow the untimely filing of a motion for judgment of acquittal. The rule at issue in *Carlisle* governs a matter after a verdict has been rendered and the Debtor's attempt to analogize this post-trial situation governed by different policies to the pretrial setting in which Bankruptcy Rule 4004(a) operates is not persuasive. *See* discussion in section III.C, *supra* at 28-34. Moreover, as noted above, the limited exceptions applicable to Rule

29(c) are materially different from the established equitable principles underlying the application of waiver to untimely limitations defenses.

In short, nothing in the *Taylor* or *Carlisle* decisions suggests that the limitations period contained in Bankruptcy Rule 4004(a) should preclude assertion of the long-established doctrine of waiver applied to litigants who fail to timely raise a limitations period as an affirmative defense.

CONCLUSION

As noted above, waiver and other equitable defenses are generally applicable to time limitations such as those provided in Rule 4004. This presumption is particularly strong in the bankruptcy context given the equitable nature of bankruptcy courts and proceedings. *Young v. United States*, 122 S. Ct. 1036, 1040-41 (2002).

Nothing in the text of Bankruptcy Rule 4004 or the structure of the Bankruptcy Code suggests that the traditional equitable defense of waiver is barred on jurisdictional or other grounds. On the contrary, the plain language of this Rule, particularly applicable in the pretrial context of an adversary proceeding, demonstrates that the rule does not expressly or impliedly preclude a finding of waiver when an affirmative defense based on the creditor's failure to comply with Rule 4004(a)'s time limitations is first raised after summary judgment.

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

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Supreme Court of the United States

ANDREW J. KONTRICK,

Petitioner,

v.

ROBERT A. RYAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION

Most deadlines set by federal rules may be waived. Yet the rulemakers have made plain that a small number may not. And contrary to respondent's various arguments, whether a deadline may be waived does not turn on a supposed "presumption" in favor of equitable exceptions in bankruptcy court. It also does not turn on whether the deadline was set by rule or statute, or whether the word "timely" appears in another statute, or whether the deadline is pre or post-judgment, or whether it favors certain policy concerns.

Rather, whether a deadline is jurisdictional, that is non-waivable, turns first and foremost on the language of the rule itself. If the language is clear, then that alone governs. As Justice Frankfurter stated, "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it." Frankfurter, Felix, SOME REFLECTIONS ON THE READING OF STATUTES, 47 Colum. L. Rev. 527, 534 (1947) (quoting *Anderson v. Wilson*, 289 U.S. 20, 27 (1933) (Cardozo, J.)).

In this case, respondent does not contend that Rules 4004 and 9006(b)(3) are ambiguous. Thus, the plain meaning of these rules controls unless in the rare case it is "demonstrably at odds" with the drafters' intent. Here, there is not the slightest indication that the plain meaning of Rules 4004 and 9006(b)(3) is in any way contrary to the rulemakers' intent. In fact, a line of authority going back over 40 years—to *United States v. Robinson*, 361 U.S. 220, 224 (1960)—consistently holds that deadlines based on Rule 6(b) must be read as "mandatory and jurisdictional" and do not allow late filings to be excused on equitable grounds such as

waiver. There is no reason to read Rules 4004 and 9006(b)(3) any differently.

ARGUMENT

A. Rule 4004 Is Not "Presumed" to Be Subject to Equitable Defenses Simply Because the Bankruptcy Court Has Equitable Powers

1. A Court of Equity Does Not Have Free Rein to Disregard the Plain Language of a Rule

Respondent begins his argument by simply declaring that Rule 4004 is a "limitations period" (Resp. Br. at 10-11) and then proceeds to the unremarkable proposition that a statute of limitations may be waived unless raised as an affirmative defense. *Id.* at 11-12, 32. Yet respondent puts the cart before the horse by first presuming that Rule 4004 is a statute of limitation. That is the central issue in this case—whether Rule 4004 is jurisdictional and thus not a statute of limitation and not waivable.

Respondent next argues that equitable defenses to statutes of limitation are "presumed" in bankruptcy cases, because bankruptcy courts are courts of equity. Resp. Br. at 12-13; 22-25. Whatever validity this statement may have in the abstract, it has no validity to the rule at issue here. Courts of equity do not have a roving commission to ignore the express language of a rule. This principle is well illustrated in *Matter of Greenig*, 152 F.3d 631 (7th Cir. 1998). In *Greenig*, certain creditors did not file their proof of claim within the deadline set by Rule 3002(c)—another one of the rules listed in Rule 9006(b)(3). However, since the debtor had already listed the claim in a plan of reorganization,

the bankruptcy court excused the untimely filing based on equitable considerations. The Seventh Circuit reversed:

> "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." (citing *INS v. Pangilinan*, 486 U.S. 875, 883 (1988) quoting *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893)...."The fact that a [bankruptcy] proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his [or her] personal views of justice and fairness, however enlightened those views may be." (quoting *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 791 F.2d 524, 528 (7th Cir. 1986)). In this case, the trial court acted improperly in that it allowed [the creditor] to circumvent Rule 3002(c) and file an untimely proof of claim because of equitable considerations.

152 F.3d at 635. *See also In re Gardenhire*, 209 F.3d 1145, 1150-51 (9th Cir. 2000) (court lacks equitable discretion to allow an untimely claim under Rule 3002(c), even though other sections in the Bankruptcy Code allow for equitable tolling). Thus, a bankruptcy court cannot—any more than another court—use its equitable powers to "presume" equitable defenses that are at odds with the unambiguous text of Rules 4004 and 9006(b)(3).

2. This Court's Decision in *Young* Recognizes That Equitable Exceptions Do Not Apply If "Inconsistent With the Text of the Relevant Statute"

Respondent and the United States as amicus rely heavily on this Court's decision in *Young v. United*

States, 535 U.S. 43 (2002). Resp. Br. at 10, 12, 38, Amicus Br. at 14-15. However, aside from the fact that the *Young* case involves the general topic of bankruptcy, it has no similarities to this one. First, *Young* did not deal with the Bankruptcy Rules in general, let alone those listed in Rule 9006(b)(3) in particular, or any of the parallel rules modeled on Fed. R. Civ. P. 6(b). Rather, *Young* dealt with a three-year look-back period for tax returns described in section 507(a)(8)(A)(i) of the Bankruptcy Code. Based on the particular language of that section and its purpose, the Court held that the three-year period could be equitably tolled by the filing of an earlier chapter 13 case. 535 U.S. at 50-51. At the same time, however, the Court recognized that it would not have allowed an equitable exception if it was "inconsistent with the text of the relevant statute." *Id.* at 49, quoting *United States v. Beggerly*, 524 U.S. 38, 48 (1998).

For this reason, the court in *In re Leet*, 274 B.R. 695 (B.A.P. 6th Cir. 2002) readily concluded that *Young* did not permit a late filing under Rule 4007 to be excused on equitable grounds:

> Some may read [*Young*] broadly, since the Court observed that "[i]t is hornbook law that limitations periods are 'customarily subject to equitable tolling,'" but that statement was finished with its own restriction, "unless tolling would be 'inconsistent with the text of the relevant statute.'" By analogy, the applicable Rule 4007(c) requires that any extension of the sixty-day limitation be sought within that time period; thus, the equitable tolling applied by the bankruptcy court in this case was *inconsistent with the text of the relevant rule*. Our conclusion is not changed by *Young*.

Id. at 700. [citations omitted, emphasis added).[1] Therefore, *Young* does not support the notion that in the realm of bankruptcy the universal principle of giving effect to the plain meaning of a rule somehow gives way to "presumptions" in favor of equitable defenses.

B. "Jurisdictional" When Used to Describe Rule 4004 Does Not Mean Subject Matter Jurisdiction

1. Rule 4004 Does Not Involve Subject Matter Jurisdiction

In his dissent in *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 39 (1952), Justice Frank-

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[1] Recently, the Sixth Circuit held that Rule 4007 was non-jurisdictional in *In re Maughan*, 2003 U.S. App. LEXIS 16656 (6th Cir. Aug. 14, 2003). In *Maughan*, the court held that the creditor could use equitable tolling to file a complaint after the deadline because the debtor had not complied with an earlier discovery request. In doing so, the court found the reasoning of the Seventh Circuit in this case "somewhat puzzling" (*Id.* at * 14, n.7) and based its holding on entirely different grounds.

The court reasoned that because it had allowed extensions when the court set the wrong deadline, this also "cracked open the door of equity through which the bankruptcy court might accept an untimely complaint." *Id.* at * 10. Extending a deadline because of the court's own error is also known as the "unique circumstances doctrine." Pet. Br. at 27-28. The idea that this doctrine is a "crack" large enough through which all equitable defenses might pass has been soundly rejected. *Id.* at 28. In fact, it is directly contrary to *Carlisle v. United States*, 517 U.S. 416 (1996). There, the Court rejected an argument that the unique circumstances doctrine could be relied on for " 'an inherent power' to act in contravention of applicable Rules." *Id.* at 428.

furter referred to what he described as "unwaivable limitations" on the authority of an administrative agency and stated, "I do not use the term 'jurisdiction' because it is a verbal coat of too many colors." *See also International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 402 (1986) ("we all know that the term 'jurisdiction' does not partake of that specialized a meaning") (Rehnquist, J. concurring). And in *American National Bank & Trust Co. v. City of Chicago*, 826 F.2d 1547, 1552 (7th Cir. 1987), the court pointed out, "when a court says it lacks jurisdiction it may mean that the plaintiff came to the wrong court, that he came too early, that he came too late ... that the legislature did not authorize the court to decide the case (subject matter jurisdiction)." Therefore, the word "jurisdiction" has a variety of different meanings depending upon the context in which it is used.[2]

The term "subject matter jurisdiction" means the power or authority of a court to adjudicate a particular type of case; it is also referred to as a court's "competency." *See* RESTATEMENT (SECOND) OF JUDGMENTS, § 11, pp. 108-09 (1982). On the other hand, when courts state—as they frequently do—that a particular deadline is "jurisdictional," they are referring to a different concept; namely, that after a certain deadline has expired, the court lacks the power to extend it based upon equitable grounds not contained in the rule. Some courts decline to use the term "jurisdictional" in favor of stating that a court lacks the authority to excuse a late filing

[2] In considering the term "jurisdiction," Justice Holmes' observation in *Towne v. Eisner*, 245 U.S. 418, 425 (1918) is apt: "A word is not a crystal, transparent and unchanged, it is the skin of living thought and may vary greatly in color and content according to the circumstances and time in which it is used."

on equitable grounds. *See, e.g., Leet*, 274 B.R. at 700, n.6. As Justice Ginsburg noted in her concurrence in *Carlisle v. United States*, 517 U.S. 416, 434 (1996), "It is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction'."

2. Respondent's Reliance on Statutes Defining the Subject Matter Jurisdiction of the Bankruptcy Court Is Misplaced

The difference between subject matter jurisdiction and deadlines referred to as "jurisdictional" is important here because both respondent and amicus devote large portions of their briefs to statutes dealing with the bankruptcy court's subject matter jurisdiction. First, they rely on the fact that the statute giving a bankruptcy court subject matter jurisdiction over objections to discharge, 11 U.S.C. § 157(b)(2)(J), does not use the word "timely" or have an express time limit. Resp. Br. at 14-16, 20-21, Amicus Br. at 10-14. They then point to other statutory provisions that do use the word "timely." *See* § 157(b)(3) (dealing with a bankruptcy court's "core" jurisdiction); § 157(c)(1) (review of non-core proceedings) and 28 U.S.C. § 1334(c)(2) (abstention). Yet where the word "timely" appears in these other statutes has no bearing on whether Rule 4004 may be altered on equitable grounds.[3]

There is no dispute that section 157(b)(2)(J) gives a bankruptcy court subject matter jurisdiction over objections to discharge. Yet that section coexists harmoniously with Rule 4004. Section 157(b) does not attempt to define when objections to discharge must be

[3] Contrary to respondent's argument (Br. at 24-25), it is also of no significance that Rules 4004 and 9006(b)(3) do not contain the words "jurisdictional" or "waiver." None of the deadlines patterned on Rule 6(b) do.

filed. That function is specifically addressed by the Bankruptcy Rules. Whether those rules allow for equitable defenses must be determined from the text of the rules themselves, unless it is "demonstrably at odds" with the drafters' intent. *See United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989). Therefore, nothing about the wording of the subject matter jurisdiction statutes sheds any light on the rulemakers' intent and cannot be used to contradict the plain meaning of Rules 4004 and 9006(b)(3).

For the same reason, the reliance which respondent and amicus place on Bankruptcy Rule 9030 is misplaced. *See* Resp. Br. at 16-17, Amicus Br. at 11, 13. Rule 9030 merely states that the rules may not "extend or limit" the bankruptcy court's jurisdiction and respondent acknowledges that this refers to subject matter jurisdiction. Br. at 16-17. By their own terms, Rules 4004 and 9006(b)(3) set deadlines for objecting to discharge and do nothing to "extend or limit" the subject matter jurisdiction of the bankruptcy court.[4]

C. Based on Respondent's Reasoning, All Deadlines Set By the Bankruptcy Rules Are Waivable—Which Is Not Correct

1. Federal Rules, Not Just Statutes, Set Deadlines That Cannot Be Waived

Respondent contends that a court may always "relax" its procedural rules. Resp. Br. at 18, citing *Schacht v. United States*, 398 U.S. 58, 68 (1970). Along

[4] Respondent's reliance on the time limit for objecting to a magistrate judge's recommendation under Fed. R. Civ. P. 72(b) (Br. at 20-21) is far afield from the text of Rules 4004 and 9006(b)(3). One obvious difference is that Rule 72 is not among the jurisdictional time limits listed in Rule 6(b).

the same lines, amicus argues that for a deadline to be jurisdictional "it would need to be established by Congress, not in a rule of practice or procedure adopted by this Court," also citing *Schacht*. Amicus Br. at 11 and n.7. However, neither *Schacht* nor any other authority support the sweeping proposition that only statutes, but not rules, can set deadlines that are not waivable. Indeed, the concurring opinion in *Schacht* by Justice Harlan easily refutes any such idea. In his concurrence, Justice Harlan recognized the distinction between the rule setting the time for filing petitions for certiorari in criminal cases and Rule 45(b) at issue in *United States v. Robinson*, 361 U.S. 220 (1960). The difference was the "express language" of the two rules. Referring to *Robinson*, Justice Harlan noted that there, "[t]he Court thought, *inter alia* that time extensions were *inconsistent with the express language of Rule 45(b)*, and the 'deliberate intention' of its drafters." 398 U.S. at 67, n.7. (emphasis added)

Thus, if the language of the rule is express, as it is in Rule 45(b), then the deadline set by a rule may not be waived. No less can be said of the express language of Rule 6(b) on which both Rule 45(b) and Rule 9006(b)(3) were patterned. Hence, what matters is not whether the deadline is set by rule or statute, but whether the plain meaning of the rule allows for equitable defenses. Thus, there is no support for the argument that all deadlines set by rules are inherently more malleable than those set by statute. *See Carlisle*, 517 U.S. at 426 ("[F]ederal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions") (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988)).

2. The Rules Enabling Act Does Not Make Every Bankruptcy Rule Waivable

Respondent also contends that the Enabling Act for the Bankruptcy Rules, 28 U.S.C. § 2075, makes every deadline set by a Bankruptcy Rule waivable. Resp. Br. at 17-19. This argument is derived from *In re Dombroff*, 192 B.R. 615 (S.D.N.Y. 1996).[5] Resp. Br. at 18. In *Dombroff*, the court attempted to advance the blanket proposition, already discredited above, that deadlines set by rules are always non-jurisdictional, relying on *Schacht* and *Shapiro v. Doe*, 396 U.S. 488, 489 (1970). *Id.* at 620, n.15. Again, *Schacht* does not stand for any such proposition. In relying on *Shapiro*, *Dombroff* actually cited to the dissent. The terse two-sentence *per curiam* decision in *Shapiro* scarcely supports the claim that all rules are waivable. 396 U.S. at 488.

Then, recognizing that some procedural rules are not waivable, *Dombroff* constructed an argument that all deadlines contained in the Bankruptcy Rules may be waived. This argument relies solely on the fact that the Rules Enabling Act, 28 U.S.C. § 2072(b), provides that the rules "supersede conflicting prior statutes" and the similar statute for the Bankruptcy Rules

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[5] The *Dombroff* case is a maverick even among the non-jurisdictional line of cases. In *Dombroff*, the court rejected two decisions relied on by respondent and amicus, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), and in *In re Santos*, 112 B.R. 1001 (B.A.P. 9th Cir. 1990), as supporting the non-jurisdictional view. The court in *Dombroff* found significant differences between the time limits in *Zipes*, involving filing employment discrimination charges and Rule 4007, such that "*Zipes* therefore provides slender support" for the non-jurisdictional view. 192 B.R. at 620. The *Santos* case relied on *Zipes*. 112 B.R. at 1004-06.

(§ 2075) does not. 192 B.R. at 621. From this, *Dombroff* found that the Bankruptcy Rules have "no statutory effect" and are not jurisdictional. *Id.* Respondent cites no court that has followed *Dombroff*.

Moreover, the fact that section 2072(b) contains what is referred to as a "supercession clause," and section 2075 does not, has nothing to do with whether all Bankruptcy Rules are waivable. The supercession clause in section 2072(b) was designed to allow the original Federal Rules of Civil Procedure from 1937 to override an earlier "Conformity Act" that required state practice rules to be followed in federal courts. MOORE'S FEDERAL PRACTICE § 1.04, 1 App. 12-13 (3d ed. 2003). In contrast, when Congress passed the Bankruptcy Reform Act of 1978, it eliminated a similar supercession clause from section 2075 because in revising the bankruptcy laws, procedural matters that had been contained elsewhere were removed and placed with the rules. As such, "the need that currently may exist to permit the Supreme Court rules to supersede the statute disappears." H.R. REP. NO. 95-595, at 449 (1977); *reprinted in* 1978 U.S.C.C.A.N. 5963, 6573. Further, this argument merely ends with the same faulty premise on which it began—that only statutory deadlines are jurisdictional. In fact, if *Dombroff* were correct, then all Bankruptcy Rule deadlines would be waivable, which is simply not so. For example, Rule 8002, also included in Rule 9006(b)(3), sets the time to appeal a bankruptcy court judgment. This rule is well-established as jurisdictional. *See In re Bond*, 254 F.3d 669, 673 (7th Cir. 2001). Thus, the Rules Enabling Act has no relevance to whether Rule 4004 is jurisdictional.

D. Giving Effect to the Plain Meaning of Rule 4004 Does Not Deprive Litigants of Their Day in Court or Undermine the Policy of Finality

Respondent also contends that not excusing untimely objections on equitable grounds "would deprive litigants of their day in court." Resp. Br. at 31. He also maintains that not permitting equitable exceptions would be contrary to the policy behind Bankruptcy Rule 1001 that the rules are to be "construed to secure the just, speedy, and inexpensive determination of every case and proceeding." *Id.* at 27. Amicus also claims that Rule 1001 favors reading the deadline as waivable. Amicus Br. at 13, 17. Such arguments have no substance.

First, giving effect to the plain meaning of Rules 4004 and 9006(b)(3) does not unfairly deprive litigants of their day in court or otherwise deny them due process. By definition, any jurisdictional deadline, that is, one that does not permit equitable exceptions, always cuts off the relief sought in the untimely filing. That is true whether the untimely filing is a proof of claim under Rule 3002(c), an objection to exemptions under Rule 4003, an appeal under Rule 8002, or an objection to discharge under Rules 4004 or 4007.

Second, the general policy behind Rule 1001 does not override the specific language of Rules 4004 and 9006(b)(3). In *Carlisle*, the defendant invoked the similar general policy behind Fed. R. Crim. P. 2. The Court rejected this argument:

> [Rule 2] is of no aid to petitioner. It sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superseding clear rules that do not achieve the stated objectives. It does not, that

> is to say, provide that rules shall be construed to mean something other than what they plainly say—which is what petitioner's proposed construction of Rule 29(c) would require.

517 U.S. at 424. The same may be said for Rule 1001 here.

Finally, when respondent claims that not allowing equitable exceptions to Rule 4004 would undermine a policy of "finality," he overlooks strong countervailing policy reasons not to allow equitable exceptions. The scenarios described by the National Association of Consumer Bankruptcy Attorneys (NACBA) as amicus involving debtors who may be pressured to waive a late objection are prime examples of the finality concerns underlying Rule 4004. *See* NACBA Amicus Br. at 15-16. Further, engrafting equitable defenses to the deadlines would invite fact-intensive inquiries that would only erode certainty and an expeditious handling of the discharge process. It was such policy concerns that caused the rulemakers to place Rules 4004 and 4007 in the strict category of Rule 9006(b)—that is, among the other rules in subsection (b)(3)—rather than in the permissive category in subsection (b)(1). And whatever the competing policy concerns may have been, they have already been weighed in the rulemaking process. At this point, the task is not to reweigh those policies, but to apply Rule 4004 as it is written.

E. The Virtually Identical Language of Rules 6(b) and 9006(b)(3) Cannot Have Entirely Different Meanings Merely Because the Bankruptcy Rules Set Prejudgment Deadlines

Respondent does not claim that there is any difference between the language of Rules 6(b) and

9006(b)(3). *See Pioneer Investor Service Co. v. Brunswick Associates Ltd.*, 507 U.S. 380, 391 (1993) ("Rule 9006(b)(3) was patterned after Rule 6(b)"). Instead, he argues that the virtually identical language of the two rules should be read differently because "different policy considerations are implicated" with the "prejudgment" deadlines set by the Bankruptcy Rules. Resp. Br. at 28, 31, 33. According to respondent, the first policy concern is that a prejudgment deadline prevents a claim from being heard "on the merits." *Id.* at 31. However, any jurisdictional deadline curtails further judicial consideration "on the merits" at some stage of the proceeding—whether that be pre-trial, post-trial or on appeal. Because the express language of Rule 4004 curtails it earlier is no reason to read Rules 6(b) and 9006(b)(3) differently.

Respondent next argues that post-trial deadlines are jurisdictional, but pre-trial deadlines are not, because post-trial time limits are necessary to "allocate decision-making authority between the district court and court of appeals." *Id.* at 30. This argument ignores that the post-trial motions contained in Rule 6(b) involve ongoing proceedings in the district court and may not be altered on equitable grounds regardless of whether an appeal is ever taken.

In addition, respondent cites no authority, other than the court below, that has adopted this prejudgment-postjudgment distinction. At the same time, he overlooks established precedent holding that other "prejudgment" deadlines set by the Bankruptcy Rules do not excuse late filings based on equitable grounds. *See Greenig*, 152 F.3d at 635 (Rule 3002(c) deadline for filing proofs of claim may not be extended for "equitable considerations"); *Gardenhire*, 209 F.3d at 1151 (same); *In re Laurain*, 113 F.3d 595, 597 (6th Cir. 1997)

(Rule 4003(b) deadline for objecting to exemptions "should be viewed as jurisdictional"); *In re Stoulig*, 45 F.3d 957 (5th Cir. 1995) (same). Moreover, the policy considerations respondent invokes for his pre-versus-postjudgment argument are only just that. Such policy concerns cannot overcome the express language of the rules.

F. The Text of Rules 4004 and 9006(b)(3) Does Not Allow For Excluding Some Equitable Defenses, But Not Others

Respondent and amicus also present an alternative to their argument that *all* traditional equitable defenses are "presumed" in bankruptcy cases. According to this argument, *some* equitable defenses do not apply, but some do. Resp. Br. at 36, Amicus Br. at 16. They do not specify which defenses do not apply—whether it is equitable tolling only or equitable tolling plus estoppel or some other variation. They do, however, claim that waiver would apply to the deadline, even if other defenses do not. They cite no authority for this selective application of equitable defenses other than *In re Santos*, 112 B.R. 1001 (B.A.P. 9th Cir. 1990). Resp. Br. at 36, Amicus Br. at 17. In *Santos*, the court found that equitable tolling and equitable estoppel did not apply to Rule 4007, but that waiver did. *Id.* at 1007-08. The court reached this conclusion in one paragraph, without citation to authority, in which it made a general statement that waiver is "not contrary to the express language" or purpose of the rule and that debtors would not suffer "any impairment" to their interests if they raised the late complaint in an answer. *Id.* at 1008.

However, the attempt in *Santos* to exclude equitable estoppel but include waiver not only lacks any legal basis, but would actually produce anomalous results. Based on the distinction made in *Santos*, a

debtor could *not* consent to an untimely objection to discharge on the day *before* the deadline, but *could* consent to an untimely filing one day *after* the deadline. Rules cannot be read to produce such anomalies. In addition, the dividing line between estoppel and waiver is not always clear and such an attempt to include or exclude defenses only invites confusion.[6]

What is more, the text of Rules 4004 and 9006(b)(3) does not allow for picking and choosing among various equitable defenses. Indeed, other deadlines based on Rule 6(b) or its counterparts have consistently been read as not excusing untimely filings based on equitable grounds, including waiver. *See In re Kirsch*, 65 B.R. 297, 302 (Bankr. N.D. Ill. 1986) ("counsel cannot waive the strict requirement of the rules" [based on Rule 6(b)]). As a result, the courts in the majority have regularly held that a debtor may not waive an untimely objection—either explicitly by stipulation or implicitly by not raising it in an answer. *See In re Poskanzer*, 146 B.R. 125, 131 (D.N.J. 1992) (debtor raised untimely objection after trial began); *In re Rinde*, 276 B.R. 330, 333 (Bankr. D.R.I. 2002) (debtor failed to plead untimely objection as an affirmative defense); *In re Dollar*, 257 B.R. 364, 367 (Bankr. S.D. Ga. 2001) (debtor not allowed to stipulate to late objection as part of settlement of other claims).[7]

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[6] "When an implied waiver is involved, the distinction between waiver and estoppel is close and sometimes the doctrines merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins." 28 AM. JUR. 2D, *Estoppel and Waiver*, § 37, p. 468 (2000).

[7] Other decisions recognizing that the deadline cannot be waived include the following: *In re Thomas*, 203 B.R. 64, 68 (Bankr. E.D. Tex. 1996) (debtor agreed to an untimely objection); *In re Barley*, 130 B.R. 66, 69 (Bankr. N.D. Ind. 1991) (untimely complaint not raised in answer or at trial); *In re Booth*, 103 B.R. 800, 801 (Bankr. S.D. Miss. 1989) (debtor failed to raise untimely filing as an affirmative defense); *In re Kirsch*, 65 BR. at 300 (debtor did not raise late filing until after trial).

Respondent's conjecture that a debtor may hold an objection to a late-filed complaint in "strategic reserve" is far more theoretical than real. Resp. Br. at 28. As the court pointed out in *Poskanzer* when holding that the deadline may not be waived, a debtor's own self-interest "will encourage prompt assertion of the bar date defense." 146 B.R. at 131. And here again, this is merely another policy argument that cannot override the explicit language of the rule.

G. Respondent and Amicus Fail to Distinguish *Taylor* or *Carlisle*

The essence of respondent's and amicus' attempt to distinguish *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) and *Carlisle* is that though these decisions did not allow an untimely filing to be excused on equitable grounds, they did not specifically consider waiver. Resp. Br. at 34-39, Amicus Br. at 17-19. This is a distinction without a difference. As to *Taylor*, neither respondent nor amicus claims that the rule at issue there, 4003, is materially different from Rule 4004 or 4007. *See Thomas*, 203 B.R. at 68 (court relies on *Taylor* and the similarities between Rules 4003 and 4007 to find that Rule 4007 is jurisdictional). Instead, respondent suggests that *Taylor* turned on the fact that the proposed bad faith exception to Rule 4003 was not an "equitable power" known at common law and thus "other traditionally recognized equitable defenses" would have still applied. Resp. Br. at 35-36. However, *Taylor* made

no mention of whether a bad faith exception was recognized at common law. Rather, it relied on the unambiguous language of Rule 4003 that an objection had to be filed within the deadline set by the rule unless the bankruptcy court extended it before it expired. 503 U.S. at 643.

Respondent also suggests that traditional equitable defenses would have applied in *Taylor* based on the bankruptcy court's general powers in section 105 of the Bankruptcy Code, if only the petitioner had raised that issue. Resp. Br. at 36. Here again, general equitable powers cannot override the express language of the rule. *See Matter of Carlson*, 126 F.3d 915, 920 (7th Cir. 1997) (equitable powers in section 105 do not allow the court to "override plain command" of another statute). And, as shown above, the text of the rules—including Rule 4003—do not permit a selective inclusion or exclusion of various gradations of equitable defenses. In sum, if Rule 4003 was clear enough not to allow a late objection under a bad faith exception, it would not allow the same untimely filing under other equitable exceptions such as waiver.

As to *Carlisle*, respondent and amicus do not contend that the wording of Rule 45(b) is materially different from Rule 9006(b)(3). Rather, again both argue that *Carlisle* does not apply because it did not specifically address waiver. Resp. Br. at 36-39, Amicus Br. at 17-18, n. 9. In *Carlisle*, the government maintained that the text of Rules 29 and 45(b) when "read together make clear that a district court lacks jurisdiction" to consider a motion for acquittal after the deadline had expired. Brief of the United States, 1995 WL 728581 at * 14.

Thus, the government's attempt to distinguish *Carlisle* here is inconsistent with its earlier position in

the same case. As such, it is left to contend that a deadline modeled on Rule 6(b) is jurisdictional when the government asserts it, but non-jurisdictional when a private citizen does. The alternative to this position is that the government may waive the Rule 45(b) deadlines—which it does not maintain and which would be contrary to settled law in any event. *See, e.g., United States v. McDowell*, 117 F.3d 974, 978-79 (7th Cir. 1997) (though neither party raised an untimely motion to reduce sentence under Rule 35(b), court notes that Rule 35 is limited by Rule 45(b) and holds that the time limit is jurisdictional). Therefore, when considering *Carlisle*, the controlling principle of this case applies once more. The unambiguous language of Rules 29 and 45(b) and the parallel language of Rules 4004 and 9006(b)(3) do not excuse untimely filings based on equitable grounds, including waiver.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ANDREW J. KONTRICK,

Petitioner,

v.

ROBERT A. RYAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 1,200 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases filed each year. NACBA is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues which cannot adequately be addressed by individual member attorneys. NACBA has filed *amicus curiae* briefs in various appellate courts seeking to protect the rights of consumer bankruptcy debtors, including briefs filed in this Court. *See, e.g.*, *Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998).

The NACBA membership has a vital interest in the outcome of this appeal. NACBA members primarily represent individual low- and moderate-income wage-earners. Many of the bankruptcy cases filed by such wage-earners involve the discharge of unsecured consumer obligations such as credit card debt. Too often in these cases, card companies and other lenders have threatened to file or have filed non-dischargeability actions based on the slimmest evidence of actual fraud by the debtor, or in situations where the requisite elements of fraud cannot be proved. Such actions may be threatened or filed simply to coerce a settlement because debtors may not

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[1] All parties to this case have consented to the filing of this brief, and letters indicating consent have been submitted contemporaneously. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, their counsel, or their members made a monetary contribution to the preparation of this brief.

have the financial wherewithal to incur the litigation costs needed to defend in the action. *See, e.g., In re Grayson*, 199 B.R. 397 (Bankr. W.D.Mo. 1996).

The issue before this Court involving application of the time deadlines for the filing of discharge and non-dischargeability actions is critical to individual debtors who wish to obtain a fresh start. *Amicus* is particularly concerned that affirmance of the opinion below will substantially undermine the calculated efforts made by Congress and the Bankruptcy Rules Advisory Committee to curtail the filing of spurious discharge actions intended simply to coerce settlements.

SUMMARY OF ARGUMENT

The Bankruptcy Code and the accompanying Federal Rules of Bankruptcy Procedure carefully balance the competing interests of the various parties in the bankruptcy process. In order for the affected parties in the bankruptcy process to be afforded finality, and for there to be efficient administration of the more than 1.5 million bankruptcy cases currently filed per year, the Code and Rules establish precise time deadlines for the taking of certain actions. With regard to some of these actions, the Rules are explicit that the deadlines are absolute. A permissive construction of the Rules that would tolerate late filings and requests for extensions based on equitable tolling doctrines will unnecessarily burden the bankruptcy court system and upset this balancing of interests.

For debtors, the Code and Rules provide that once the statutory and procedural requirements have been satisfied, the debtor shall promptly be granted a discharge of debts. This discharge is the critical element of the debtor's fresh start, mainly because of the finality that the Code and Rules ascribe to it. This finality permits the debtor to make informed decisions upon emerging from bankruptcy and reentering into

the financial marketplace. Similarly, former creditors of the debtor obtain certainty as to the treatment of their claims and new creditors are permitted to rely upon the finality of the debtor's discharge in striking new bargains with the debtor.

The Code and Rules are also intended to work in tandem to curb certain creditor abuses that existed in the pre-Code era. Prior to enactment of the Code, the fresh start goals of the bankruptcy discharge were often frustrated by creditor attempts to assert long after the bankruptcy was concluded that a debt was not discharged in the debtor's bankruptcy. These efforts typically involved suits brought in non-bankruptcy forums alleging that the debt was obtained by fraud or a false financial statement, and often resulted in debtors waiving their discharge. Congress sought to close the door on frivolous non-dischargeability actions brought to coerce settlements by providing in § 523(c) that all such actions must be brought in the bankruptcy court during the pendency of the case. The playing field was further leveled by the adoption of a comprehensive set of procedural rules that requires creditors to bring such actions within a specified time period or automatically lose the right to pursue the action. *Amicus* is concerned that a permissive construction of these carefully crafted rules by this Court will breathe new life into this practice Congress sought to eliminate.

While these policy considerations are of paramount importance, ultimately the issue in this case may be resolved by a simple parsing of the language in the Rules in question. The plain language of the Rules makes clear that a discharge objection action must be filed by a specified deadline, and that the bankruptcy court may not exercise discretion to extend the deadline based on equitable tolling doctrines. Moreover, this Court in *Taylor v. Freeland & Kronz* refused to afford a permissive construction to a set of bankruptcy rules almost identical to those at issue here. Thus,

the language of the statute and this Court's decision in *Taylor* compel reversal of the decision below.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE BANKRUPTCY RULES MANDATES THAT A DISCHARGE SHALL BE GRANTED IN FAVOR OF THE DEBTOR UNLESS A TIMELY OBJECTION IS RAISED.

A. This Court's Inquiry Need Go No Further Than An Examination Of The Text Of Bankruptcy Rules 4004, 4007 And 9006.

The court below failed to find the "definitive answer" in the language of Bankruptcy Rules 4004(a) and 4007(c) because the question it sought to answer was whether the time limitations in the rules are "jurisdictional in nature." *Ryan v. Kontrick*, 295 F.3d 724, 730 (7th Cir. 2002). Decisions of this Court involving application of numerous procedural court rules make clear that the court below need not have probed for such a fundamental jurisdictional element. Rather, the Rules in question here concern simply the relevant time limitations for the filing of discharge and dischargeability objection actions in bankruptcy. The only relevant question presented in this case is whether the plain words of the Rules permit extensions of the time deadlines for reasons not expressly provided for in those Rules. *See Carlisle v. United States*, 517 U.S. 416, 434, 116 S.Ct. 1460, 1470, 134 L.Ed.2d 613 (1996) (Ginsburg, J. concurring) ("It is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction.'").

On this point, the Rules could not be more explicit. Both Rules 4004(a) and 4007(c) unequivocally

state that a complaint objecting to a debtor's discharge or the discharge of a particular debt under § 523(c) of the Bankruptcy Code must be filed within 60 days of the date first set for the meeting of creditors. Significantly, both Rules 4004(b) and 4007(c) delineate the limited circumstances in which the time deadline may be extended; the court may for cause extend the deadline only if the party seeking the extension files a motion before the time deadline expires. No other exceptions are provided for in the Rules.

Though Rules 4004(a), 4004(b) and 4007(c) are clear enough on their own, any possibility that further grounds may be asserted for extension of the 60-day time deadline is foreclosed by Bankruptcy Rule 9006(b)(3). This Rule states that the strict time deadline in Rules 4004(a) and 4007(c) may be enlarged "only to the extent and under the conditions stated in those rules."

Read together, these provisions create a scheme for determining objections to dischargeability that is coherent, uncomplicated and clear. In order to challenge a debtor's right to a discharge or the discharge of a particular debt, a trustee or creditor must object within 60 days of the date set for the meeting of creditors or seek additional time to object within that period. The failure of any party to pursue an objection or to seek an extension of time within the statutory period means that the debtor has met the statutory conditions for entitlement to discharge and that the court shall "forthwith grant the discharge." Fed. R. Bankr. P. 4004(c).

In engaging in its jurisdictional analysis of the Rules in question, the court below ignored this Court's admonition that the starting point in all cases of statutory construction must be the language of the statute itself. *Toibb v. Radloff*, 501 U.S. 157, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991); *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 110 S.Ct. 2126, 2130, 109 L.Ed.2d 588 (1990); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989); *United*

States v. Steele, 147 F.3d 1316, 1318 (11th Cir.1998) (*en banc*) ("In construing a statute we must begin, and often should end as well, with the language of the statute itself.") (*quoting Merritt v. Dillard*, 120 F.3d 1181, 1185 (11th Cir.1997)). The plain meaning of the statute should be "conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters." *Ron Pair*, 109 S.Ct. at 1031 (*quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250 (1982)).

This Court has stated a similar mandate in requiring adherence to the plain language of properly promulgated court rules. Courts have no authority to tamper with the plain language of Rules of Court, including limitations periods. *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986).[2]

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[2] In his concurring opinion in *Torres v. Oakland Scavenger Co.*, Justice Scalia stated the following principles in construing the application of a rule of procedure that is applicable here:

> By definition all rules of procedure are technicalities; sanctions for failure to comply with them always prevents the court from deciding where justice lies in the particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases. It seems to me moreover, that we should seek to interpret the rules neither liberally or stingily, but only, as best we can, according to their apparent intent. Where the intent is to provide leeway, a permissive construction is the right one; where it is to be strict, a permissive construction is wrong.

Torres v. Oakland Scavenger Co., 487 U.S. 312, 319, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988).

B. This Court's Opinion In *Taylor v. Freeland & Kronz* Compels Reversal Of The Decision Below.

The bankruptcy rules in question here are functionally identical to the bankruptcy rules this Court had occasion to construe in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992). In an unambiguous opinion, based on the plain language of comparable Rule 4003(b), this Court held that the strict time deadline established for the filing of objections to exemptions was absolute. This opinion in *Taylor* left no room in its analysis for the application of equitable considerations that might excuse an out-of-time objection filing such as waiver, fraudulent concealment or excusable neglect. Quite simply, this Court held that there can be no judicial review of the underlying basis for the debtor's claim of exemption if the time deadline passes without the filing of an objection or a request for extension.

Given the stark similarities in the text and purpose between Rule 4003(b) in *Taylor* and Rules 4004(a), 4004(b) and 4007(c) in this case, the courts below should not have excused the Respondent's late-filed count to his discharge objection complaint on the basis of the Petitioner's apparent waiver of the deadline requirement. As one leading treatise on bankruptcy law has observed about the application of *Taylor* on Rules 4004(a) and 4004(b): "In *Taylor v. Freeland & Kronz*, the Supreme Court made clear that deadlines in the federal Rules of bankruptcy procedure mean what they say and that violations of such deadlines cannot be ignored or excused." *Collier on Bankruptcy*, ¶ 4004.02[3] at p. 4004-6 (15th ed. rev.).

While *Taylor* alone compels reversal of the decision below, other decisions of this Court have upheld and enforced provisions of similar court rules in situations where the consequences of denying relief to untimely parties were harsher than in the proceeding here. For example, in *Carlisle v. United States*, 517 U.S. 416,

116 S.Ct. 1460, 134 L.Ed.2d 613 (1996), equitable considerations such as excusable neglect were not permitted to save a motion for judgment of acquittal filed one day late by a criminal defendant based on the plain language of Fed. R. Crim. P. 29(c). Similarly, in *United States v. Robinson*, 361 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), indigent criminal defendants were denied their right of appeal for their failure to timely file a notice of appeal based on the plain language of Fed. R. Crim. P. 45(b). And in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed. 2d 285 (1988), the plain language of Fed. R. App. P. 26(b) was applied to cut off an appeal by a party not named in a notice of appeal.

What unifies all of these opinions is that the rules under consideration in each set forth conditions in which a court may properly extend the time for the relevant action to be taken. *E.g.*, Fed. R. Crim. P. 29(c) ("a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period."). Moreover, the cases all involved an additional procedural rule, such as Bankruptcy Rule 9006(b), that prohibits a court from enlarging time periods for certain actions.[3] In each case, this Court held that there can be no deviation from the strict time deadlines expressed in the rules. This case presents no

[3] Bankruptcy Rule 9006(b) is patterned after Fed. R. Civ. P. 6(b) and Fed. R. App. P. 26(b). *See* Fed. R. Bankr. P. 9006, Advisory Committee Note; *In re Hill*, 811 F.2d 484, 487 (9th Cir. 1987). Another analogous rule is Fed R. Crim. P. 45(b), which provides that while excusable neglect may relieve a party from the consequences of certain untimely actions, "the court may not extend the time for taking any action under [certain specified Rules] . . . except to the extent and under the conditions stated in [those Rules]."

sound justification for a departure from this well-established precedent.[4]

In its opinion, the court below failed to consider this precedent and did not appreciate the striking similarities between this case and *Taylor*, as reflected by the court's blithe dismissal of *Taylor* in a footnote. *Kontrick*, 295 F.3d at 733-34, n.4. The court below also reached the untenable conclusion, stated in the negative, that *Taylor* did not hold that "Rule 4003(b) was not subject to the usual equitable doctrines that apply to other deadlines and statutes of limitations." *Id.* This view of *Taylor* completely ignores the factual setting in which the case was presented as the Trustee in *Taylor* clearly sought to interpose equitable tolling considerations based on the debtor's alleged lack of good faith in claiming the exemption. If there be any doubt that the *Taylor* holding was intended to cut off the use of such equitable doctrines, the dissent in *Taylor* made clear its concern that the majority opinion denies to courts the discretion to extend applicable time deadlines based on equitable tolling principles such as "fraudulent concealment or undiscovered fraud." *Taylor*, 503 U.S. at 647-48.

C. The Rules In Question Do Not Permit Extensions Of The Time Deadlines Beyond Those Explicitly Provided For In The Rules Themselves.

The court below made much of what it characterized as the "flexibility" of Rules 4004(b) and 4007(c) in permitting extensions of the filing deadlines. From this, the court extrapolates an intention in the rules to permit other forms of tolling considerations, including equitable doctrines such as waiver. However, the

[4] It is worth noting that this Court in *Taylor* and *Carlisle* reached decisions without seeking to determine whether the rules in question were jurisdictional. The term "jurisdictional" is simply not used in the majority opinions.

plain language of these Rules, and their counterparts in other federal rules of procedure, does not evince the leniency or lack of rigidity suggested by the court below. On the contrary, by mandating that requests for extensions of time be filed within the 60-day period, the absolute nature of the time deadline is retained.[5]

Rule 4004(b) explicitly states that extension of the deadline can be granted only if a party in interest files a motion before the deadline expires and only if the court determines at a hearing that cause exists for extending the deadline. Where a rule or statute sets out well-defined conditions and a procedure for seeking an extension of time, it must be read to exclude other exceptions not otherwise provided for. *See, e.g., U.S. v. Brockamp*, 519 U.S. 347, 352, 117 S.Ct. 849, 136 L.Ed.2d 818 (1997) ("[A tax refund statute's] detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, "equitable" exceptions into the statute that it wrote."). As the court in *In re Leet* stated:

> Where the exceptions are specified, it would seem anomalous to allow the contamination of the system by legal concepts foreign to it. If the drafters of the rules had intended the exception urged by the Creditors, it should logically appear in the rules.

In re Leet, 274 B.R. 695, 700 (B.A.P. 6th Cir. 2002).

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[5] It may be noted that a similar provision for requesting an extension of the filing deadline found in Bankruptcy Rule 4003(b) did not persuade this Court in *Taylor* that the Rule contemplates other tolling factors.

This Court's opinion in *U.S. v. Beggerly*, 524 U.S. 38, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998), further undermines the rationale of the lower court on this point by finding that any flexibility in a statute of limitations should not be read as opening the door to additional tolling exceptions not listed in the statute itseif. In *Beggerly*, this Court found that the statute in question relating to the filing of quite title actions against the government "already effectively allowed for equitable tolling" by providing that the limitations period does not begin to run until the plaintiff "knew or should have known of the claim of the United States." In refusing to permit equitable tolling that is "inconsistent with the text of the relevant statute," this Court held that any additional equitable tolling beyond that provided for in the statute would be "unwarranted." *Beggerly*, 524 U.S. at 48-49.

II. POLICY CONSIDERATIONS IN THIS CASE DO NOT FAVOR A PERMISSIVE CONSTRUCTION OF THE DISCHARGE OBJECTION RULES.

The principal goal of most bankruptcy cases is the entry of a discharge, a purpose that is consistent with the policy of providing debtors with an opportunity for a fresh start. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). In enacting the Code, Congress was concerned that once a debtor completes a bankruptcy case, he or she should obtain the benefit of a "fresh start." *See, e.g.*, H.R. Rep. No. 595, 95th Cong., 1st Sess. 117 (1977) (fresh start is the "essence of modern bankruptcy law"); H.R. Rep. No. 595, 95th Cong., 1st Sess. 125 (1977) ("purpose of straight bankruptcy . . . is to obtain a fresh start"). This Court has frequently echoed the same concern under both the former Act and the Code:

> This Court has certainly acknowledged that a central purpose of the Code is to

> provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934).

Grogan v. Garner, 110 U.S. 1945, 111 S.Ct. 654, 659, 109 L.Ed.2d 308 (1991).

The availability of a discharge, however, is not absolute as there are certain limited categories of debts that may be excepted from discharge under § 523(a), and the debtor may be completely denied a discharge under § 727.

A well-established doctrine in bankruptcy consistent with the law's fresh start goal is that exceptions to discharge should be narrowly construed. *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998); *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) ("In view of the well-known purposes of the bankrupt law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed. . . ."). This doctrine should apply with equal force to rules intended to implement the Code's dischargeability exception provisions.

If the applicable Rules in this case are strictly construed and enforced without exception, the significant policy goal of finality in the bankruptcy process will be furthered, which is a critical element of a debtor's fresh start. *Taylor*, 503 U.S. at 644 ("Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality."); *In re Harrison*, 71 B.R. 457, 459 (Bankr.D.Minn.1987) (["The 60-day limitation period] is designed to further the 'fresh start' goals of bankruptcy relief; it requires creditors to promptly join their exceptions to discharge of debt and objections to discharge, so a petitioning

debtor will enjoy finality and certainty in relief from financial distress as quickly as possible."); *In re Klein*, 64 B.R. 372, 375 (Bankr.E.D.N.Y. 1986) (The Rules reflect the "notion that bankruptcy in the life of an individual is a passing phenomenon, after which life must go on. The viability and rapidity of that process is the essence of the discharge in bankruptcy and related fresh start doctrine.").

Amicus is concerned that this important goal of finality be achieved particularly in regard to nondischargeability actions brought under § 523(c). The Bankruptcy Code makes an important distinction between two categories of exceptions to discharge; those debts that are excepted from discharge regardless of whether the issue is raised during the bankruptcy and those that are excluded from the discharge only if nondischargeability is raised and determined during the bankruptcy. 11 U.S.C. § 523(c). Among other effects, the 60-day time deadline in Bankruptcy Rule 4007(c) permits the debtor to know exactly where he or she stands in regard to potential creditor actions before the bankruptcy is concluded and to determine with certainty the scope of the discharge granted.

The Advisory Committee note to Rule 4007(c) expresses a similar sentiment:

> Subdivision (c) differs from sub-division (b) by imposing a deadline for filing complaints to determine the issue of dischargeability of debts set out in § 523(a)(2), (4) or (6) of the Code. The bankruptcy court has exclusive jurisdiction to determine dischargeability of these debts. If a complaint is not

timely filed, the debt is discharged. See § 523(c).[6]

The benefits of finality in the bankruptcy process are not limited to debtors. As the debtor begins the process of financial rehabilitation after bankruptcy, the finality of the discharge permits new creditors to make informed decisions on future dealings with the debtor. Certainly, such creditors should be entitled to rely upon the debtor's discharge and should not need to fear that any new bargain with the debtor may be at risk because of an untimely attack on the debtor's discharge or the dischargeability of a particular debt.

Moreover, the finality contemplated by enforcement of the time limits in these Rules is crucial to the efficient administration of the bankruptcy court system. Strict enforcement of the time deadlines currently has the deterrent effect of virtually eliminating late-filed discharge objections. A permissive rule construction will almost certainly result in a substantial increase in the number of adversary proceedings filed in which bankruptcy courts will be called upon to exercise discretion in extending the objection deadlines on grounds such as excusable neglect, waiver, reliance, fraudulent concealment and other equitable tolling arguments. Hearings on such matters are by nature extremely fact intensive. Given the vast increase in the number of bankruptcy filings since the bankruptcy rules were initially drafted[7], relaxation of the current rules will no doubt exert undue pressure on an already burdened bankruptcy court system.

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[6] Advisory Committee Notes to procedural rules can serve to guide the interpretation of those rules. *In re Kearney*, 105 B.R. 260, 264, n.4 (Bankr.E.D.Pa. 1989).

[7] Based on data provided by the Administrative Office of the Courts, the number of total bankruptcy filings has increased from approximately 331,000 filings in 1980 to approximately 1.5 million in 2002.

The concern of consumer debtors in this case, however, is not limited simply to the uncertainty and lack of finality that a permissive construction of the rules would foster. Low and moderate-income debtors have reason to be even more apprehensive of a rule construction that would encourage the filing of untimely dischargeability actions. Unlike the parties in this action, typical consumer debtors do not have the financial means to engage in protracted litigation over dischargeability claims.[8] As such, they are particularly vulnerable to creditor attempts to settle threatened or filed dischargeablity actions so as to avoid litigation costs, even when the actions are groundless either in terms of the merits of the equitable tolling argument or the underlying claim. *See, e.g., In re Grayson*, 199 B.R. 397 (Bankr.W.D.Mo. 1996). A creditor who has not been diligent in meeting the 60-day filing deadline, but who appreciates the economics of the situation, will not be deterred from threatening suit, knowing that the debtor will likely pay $500 as a nuisance settlement rather than face $3,000 in litigation costs to defend the claim on the merits.

Of course, the consequences of this kind of practice are even more severe in the case of an unrepresented debtor. Because a consumer bankruptcy debtor's relationship with his or her lawyer typically ends when the bankruptcy case is concluded, it is very likely that most debtors who

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[8] In a recent study of some 4,000 no-asset Chapter 7 cases filed in 84 districts during 1999-2000, the authors concluded not surprisingly that the "typical chapter 7 debtor has a relatively low income and relatively high unsecured debts, mostly credit card debt." The study found that the average gross income for surveyed debtors was $27,324, and the average net income was $21,444. *See "Bankruptcy by the Numbers: Lifestyles of the Rich and Bankrupt,"* Ed Flynn and Gordon Bermant, American Bankruptcy Institute Journal, September, 2000.

would face untimely dischargeability challenges would be unrepresented.[9]

Strict enforcement of Bankruptcy Rules 4007(c) and 9006(b)(3) will discourage the filing of spurious dischargeability actions and effectuate the policy supporting § 523(c). As the court in *In re Kirsch* has stated:

> The result is automatic and sometimes leads to harsh results. However, Congress intended to establish a system whereby certain types of nondischargeability claims would be automatically cut off after a relatively short period of limitations in order to prevent debtors from being harassed by creditors after their claims had been discharged in bankruptcy. Congress meant to cure the abuse whereby debtors were routinely sued by creditors long after bankruptcy creditors [*sic*] claiming that their claims were not discharged because of fraud or a false financial statement. *See* Countryman, "The New Dischargeability Law", 45 Am. Bankr.L.J. 1 (1971). This policy underlies § 523(c) of the Bankruptcy Code.

In re Kirsch, 65 B.R. 297, 299 (Bankr.N.D.Ill. 1986); *see also In re Rowland*, 275 B.R. 209 (Bankr.E.D.Pa. 2002).[10]

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[9] The decision below adds further complications for unrepresented debtors who are unfamiliar with the Rule deadlines and are likely to waive their application. Even if such debtors subsequently retain counsel to represent them in such proceedings, their prior waiver while unrepresented will preclude them from asserting the timeliness defense if the decision below is affirmed.

[10] A similar policy goal is evident in other provisions of the statute, most notably § 523(d) which permits the award of attorneys fees to the debtor if the creditor's position in a nondischargeability action is not substantially justified. *See In re Shurbier*, 134 B.R. 922, 927 (Bankr.W.D.Mo. 1991)("The section was enacted to prevent a creditor from bringing dischargeability actions in order to coerce a settlement from an honest debtor anxious to avoid large attorney fees."), *citing* H.R. Rep. No. 595, 95 Cong., 1st Sess., 131 (1977), U.S. Code Cong. & Admin. News, 1978, p. 5787. *See also* S.Rep. No. 989, 95th Cong.2d Sess. 80 (1978), 1978 U.S.Code Cong. & Admin. News, p. 5866.

Finally, reversal of the decision below is also supported by the overall objectives of the Federal Rules of Bankruptcy Procedure as expressed in Rule 1001. This Rule states that "[t]hese rules shall be construed to secure the just, speedy and inexpensive determination of every case and proceeding." Citing this Court's opinion in *Katchen v. Landy*, 382 U.S. 323, 328, 86 S.Ct. 467, 472, 15 L.Ed. 2d 391 (1966), the Advisory Committee note goes on to state that "[t]he objective of 'expeditious and economical administration' of cases under the Code has frequently been recognized by the courts to be 'a chief purpose of the bankruptcy laws.'"[11]

To this end, strict enforcement of the provisions of Rules 4004(a), 4007(c) 9006(b)(3) is necessary to ensure the "prompt administration of bankruptcy cases." *See* Advisory Committee Note to Fed. R. Bankr. F. 9006(b)(3). This Court reached a similar conclusion in *Carlisle* when considering the affect of an analogous general procedural rule, Fed. R. Crim. P. 2.[12] This Court stated in *Carlisle* that:

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[11] This Court stated in *Katchen* that the "chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration of the estate of all bankrupts within a limited period.'" *Katchen v. Landy*, 382 U.S. 323, 328-329, 86 S.Ct. 467, 472, 15 L. Ed. 2d 391 (1966) *quoting Ex Parte Christy*, 3 How. 292, 312, 11 L.Ed. 603.

[12] Fed. R. Crim. P. 2 provides that the rules of criminal procedure "be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

> We see neither simplicity, nor fairness, nor elimination of delay in a regime that makes it discretionary whether an untimely motion for judgment of acquittal will be entertained.

Carlisle v. United States, supra, 517 U.S. at 431.

CONCLUSION

For all the foregoing reasons, this Court should reverse the decision below of the Seventh Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

ANDREW J. KONTRICK, PETITIONER

v.

ROBERT A. RYAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the requirement in Fed. R. Bankr. P. 4004(a) that a complaint objecting to a bankruptcy discharge "shall be filed no later than 60 days" after the meeting of creditors may be forfeited by the debtor.

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In the Supreme Court of the United States

No. 02-819

ANDREW J. KONTRICK, PETITIONER

v.

ROBERT A. RYAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

Pursuant to Section 727 of the Bankruptcy Code, the trustee of the debtor's estate, the United States trustee, or any creditor may object to the granting of a discharge of a debtor. 11 U.S.C. 727(c)(1). Rule 4004(a) of the Federal Rules of Bankruptcy Procedure specifies that "a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors * * * ." This case presents the question whether the requirement that the objection to discharge be filed within the 60-day period specified in Rule 4004(a) may be forfeited by the debtor. Because the United States is a creditor in many bankruptcies and, through the United States Trustee Program, supervises the admini-

stration of bankruptcy cases, the United States has a strong interest in the proper interpretation and application of this Rule.[1]

BANKRUPTCY RULES INVOLVED

1. Rules 4004(a) and (b) of the Federal Rules of Bankruptcy Procedure provide:

> (a) **Time for Filing Complaint Objecting to Discharge; Notice of Time Fixed.** In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). In a chapter 11 reorganization case, the complaint shall be filed no later than the first date set for the hearing on confirmation. At least 25 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney.
>
> (b) **Extension of Time.** On motion of any party in interest, after hearing on notice, the court may for cause extend the time to file a complaint objecting to discharge. The motion shall be filed before the time has expired.

2. Rule 9006(b)(1) and (3) of the Federal Rules of Bankruptcy Procedure provide:

> (b) **Enlargement.**

[1] See also 11 U.S.C. 307 (the United States Trustee may appear and be heard on any issue in any bankruptcy case). The United States Trustee Program is created by 28 U.S.C. 581-589. In the administration of that program, the United States Trustee files hundreds of complaints each year that object to the entry of a discharge or seek revocation of a discharge.

> (1) *In General.* Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules * * *, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.
>
> * * * * *
>
> (3) *Enlargement limited.* The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

STATEMENT

1. In a Chapter 7 liquidation case, a debtor who satisfies the several conditions set forth in Section 727(a) of the Bankruptcy Code is to receive an order discharging his debts. 11 U.S.C. 727(a).[2] A discharge

[2] Under Section 727(a) of the Bankruptcy Code, a court may not grant a discharge if the debtor (i) is not an individual, (ii) has concealed, transferred or destroyed property of the estate in the year preceding bankruptcy or during the bankruptcy case, (iii) has destroyed books and records, (iv) has knowingly given a false oath or account, (v) has presented or used a false claim, (vi) has attempted to obtain money by acting or forbearing to act, (vii) has withheld documents relating to the debtor's property or financial affairs, (viii) has failed to explain a loss or deficiency of assets, (ix) has refused to obey court orders, (x) has refused to testify in the

granted under this Section frees the debtor from all debts that arose before the bankruptcy case commenced other than those excepted from discharge under Section 523 of the Code. 11 U.S.C. 727(b).[3]

The trustee, the United States trustee, or any creditor may object to the granting of a discharge under Section 727. 11 U.S.C. 727(c)(1). Such an "objection[] to discharge" is a "core proceeding" within the jurisdiction of the bankruptcy court. 28 U.S.C. 157(b)(2)(J). Nothing in the Bankruptcy Code, however, specifies a time or deadline for filing such an objection. Instead, the time frame for filing a complaint objecting to a discharge is set forth in Rule 4004(a) of the Federal Rules of Bankruptcy Procedure. That Rule states in relevant part that "a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors * * * ." Rule 4004(b) then goes on to provide that "[t]he court may for cause extend the time to file a complaint objecting to discharge" if the motion is "filed before the time has expired." And, Rule 9006(b)(3), which addresses motions for enlargement of

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case, (xi) has received a chapter 11 discharge within six years of the filing of the current bankruptcy case, (xii) has received a chapter 12 or 13 discharge within six years in a case in which the debtor did not pay at least 70 percent of the allowed unsecured claims or, in certain circumstances, all of those claims, unless the court approves a written waiver of discharge after the order for relief in the case has been entered. 11 U.S.C. 727(a)(1)-(10).

[3] Many specific types of debts are excepted from discharge by Section 523. See, *e.g.*, 11 U.S.C. 523(a)(1) (certain debts "for a tax or a customs duty"); 11 U.S.C. 523(a)(2)(A)) (certain debts for money obtained by "false pretenses * * * or actual fraud"); 11 U.S.C. 523(a)(6) (debts for "willful and malicious injury by the debtor").

time generally, further provides that "the court may enlarge the time for taking action under Rule[ ] 4004(a) * * * only to the extent and under the conditions stated in [that] rule." Fed. R. Bankr. P. 9006(b)(3).[4]

2. On April 4, 1997, petitioner filed a voluntary petition for bankruptcy under Chapter 7. Pet. App. 1. Respondent, who is one of petitioner's creditors, sought and obtained three separate extensions of the 60-day deadline for filing an objection to discharge under Rule 4004(a). The final extension was until January 13, 1998. Pet. App. 3-4, 26.

On January 13, 1998, respondent filed an adversary complaint that objected to petitioner's discharge. In that complaint, respondent alleged that petitioner had transferred property within one year of filing bankruptcy with intent to defraud and should therefore be denied a discharge under 11 U.S.C. 727(a)(2)-(5) of the Bankruptcy Code. See Pet. App. 4, 26; note 2, *supra*. On May 6, 1998, without an additional court-approved extension, respondent filed an amended complaint that asserted an additional objection to discharge. The new objection was based on respondent's allegation that

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[4] An analogous provision provides for objections to the discharge of a particular debt pursuant to 11 U.S.C. 523(c). See note 3, *supra*. Rule 4007(c) specifies that "[a] complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a) * * * . On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired." Because the language in Rules 4007(c) and 4004(a) and (b) are virtually identical, courts have found it appropriate to consider decisions construing Rule 4007(c) in determining whether the time limit set forth in Rule 4004(a) may be forfeited. See Pet. App. 8 n.3.

petitioner had fraudulently transferred money to his wife by removing his name from a family checking account and then continuing to deposit his salary into the account. According to the amended complaint, such transfers were fraudulent and therefore provided an additional basis for denying the discharge under Section 727(a)(2)(A). See Pet. App. 4, 27.

Petitioner filed an answer in which he denied liability on the asserted fraudulent transfers. He did not, however, object to the amended complaint on the ground that it was filed beyond the time permitted by Rule 4004. Pet. App. 4.

3. The bankruptcy court granted respondent's motion for summary judgment. The court concluded that the fraudulent transfers described in the amended complaint were appropriate grounds for denying petitioner a discharge under Section 727(a)(2). Pet. App. 4-5.

Petitioner then moved for reconsideration. In that motion, he argued for the first time that the allegations of the amended objection to discharge were untimely and that the court was therefore deprived of "jurisdiction" to deny his discharge on those grounds. The bankruptcy court held that the time limit set forth in Rule 4004(a) is not "jurisdictional" and that, by not raising a timely objection to the grounds stated in the amended complaint, petitioner had forfeited his objection under that Rule. Pet. App. 5, 29.

4. The district court upheld the bankruptcy court ruling. Pet. App. 25-38. The court agreed with the holding of *In re Santos*, 112 B.R. 1001, 1008 (B.A.P. 9th Cir. 1990), that "the timeliness of a dischargeability complaint presents an affirmative defense that must be raised in an answer or responsive pleading [and that] [i]f the defense is not raised in the answer or responsive

pleading, it is generally waived." Pet. App. 31-32.[5] Adopting the reasoning of the Second Circuit in *In re Benedict*, 90 F.3d 50, 54 (1996), and of the Fourth Circuit in *Farouki* v. *Emirates Bank International, Ltd.*, 14 F.3d 244, 248 (1994), the court noted that the filing requirement set forth in Rule 4004(a) is not different from "a statutory provision that imposes a filing deadline" and that "statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling." Pet. App. 31. The court therefore concluded that, "[b]y not raising the timeliness of the family account claim in his responsive pleading, [petitioner] waived the objection." *Id.* at 33.

5. The court of appeals affirmed. Pet. App. 1-23. The court emphasized that the statutes that grant jurisdiction to the bankruptcy courts "over bankruptcy matters do not indicate that timeliness of objections to discharge is a jurisdictional predicate." *Id.* at 12 (citing 28 U.S.C. 157(b)(2)(J)). The court agreed with the holding of the Second and Fourth Circuits that the timely filing requirement of Rule 4004(a) is not "jurisdictional" and, like other limitations provisions,

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[5] The issue in this case is more accurately described as one of forfeiture rather than waiver. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). Although in other contexts that distinction has material consequences, that is not the case for Rule 4004. And, since the lower court opinions use these terms interchangeably, this brief will not retain the distinction. See *Freytag* v. *Commissioner*, 501 U.S. 868, 895 n.2 (1991) (Scalia, J., concurring) ("I shall not try to retain the distinction between waiver and forfeiture throughout this opinion, since many of the sources I shall be using disregard it.").

may therefore be waived. Pet. App. 14 (citing *In re Benedict*, 90 F.3d at 53-54; *Farouki* v. *Emirates Bank International, Ltd.*, 14 F.3d at 248).

The court of appeals noted that petitioner did not challenge the timeliness of respondent's objection to discharge under Rule 4004(a) prior to his motion for rehearing in the bankruptcy court. Pet. App. 18. The court of appeals concluded that petitioner waived the affirmative defense that the objection to discharge was untimely by not raising that defense until *after* the court ruled on the merits of the objection. *Ibid.*

SUMMARY OF ARGUMENT

1. The court of appeals correctly determined that the time limit set forth in Rule 4004(a) is subject to forfeiture. The core jurisdiction of the bankruptcy courts expressly encompasses all "objections to discharge." 28 U.S.C. 157(b)(2)(J). In that statute, Congress did not impose, as a jurisdictional predicate, a requirement that objections to discharge be filed in a timely manner under the bankruptcy rules. To the contrary, while this statute requires that *some* matters be timely asserted as a prerequisite of core jurisdiction, the statute contains no such requirement for objections to discharge. Nothing in this jurisdictional statute thus indicates that bankruptcy courts have jurisdiction only over objections to discharge that are timely filed under the bankruptcy rules or that a debtor otherwise cannot forfeit an argument about the timeliness of an objection to discharge by failing to raise the argument.

Moreover, the bankruptcy rules themselves specify that they are not to be construed either to extend or limit the jurisdiction of the bankruptcy courts. Fed. Bank. R. Proc. 9030. The filing deadline for objections to discharge in Rule 4004(a) is thus expressly not "jurisdictional." Instead, like other filing deadlines, it operates "like a statute of limitations" and is therefore "subject to [the defenses of] waiver, estoppel and equitable tolling." *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

2. That does not, of course, mean that the doctrine of forfeiture—or equitable defenses such as tolling or estoppel—would always be applicable under Rule 4004(a) and that a failure to raise an argument about the timeliness of an objection to discharge would always result in forfeiture of that argument. In this case, however, petitioner no longer argues that a factual basis for a finding of forfeiture does not exist. Instead, petitioner incorrectly urges only that the timely filing requirement of Rule 4004(a) is "jurisdictional" and therefore may never be forfeited.

3. Petitioner errs in claiming that the decision of the court of appeals conflicts with this Court's decision in *Taylor* v. *Freeland & Kronz*, 503 U.S. 638 (1992). In *Taylor*, the Court held that the time limits for filing objections to a debtor's list of exempt property in Rule 4003 apply even for exemptions that are not claimed in "good faith." *Id.* at 644-645. That decision does not suggest that the deadline in Rule 4003 is jurisdictional and does not support a contention that a debtor cannot forfeit the defense that an objection to discharge is untimely under Rule 4004(a).

ARGUMENT

THE TIME LIMITS IMPOSED IN RULE 4004(a) FOR FILING AN OBJECTION TO DISCHARGE MAY BE FORFEITED BY THE DEBTOR

This Court has made clear that, unless strict compliance with a filing deadline is a prerequisite to the jurisdiction of the court, "[s]tatutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling." *United States* v. *Locke*, 471 U.S. 84, 94 n.10 (1985). See *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). In this case, the court of appeals correctly held that the time limits imposed by Rule 4004(a) of the Federal Rules of Bankruptcy Procedure are not "a jurisdictional prerequisite to suit in federal court, but [are instead] a requirement that, like a statute of limitations, is subject to waiver, estoppel and equitable tolling" (*Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. at 393).

A. The Federal Rules Of Bankruptcy Procedure Do Not Have Jurisdictional Effect

1. The jurisdiction of the lower federal courts is created by statute, not by rules of practice. As this Court has emphasized, "[i]t is axiomatic" that the rules of practice and procedure established by this Court for the lower federal courts can neither create nor destroy the jurisdiction that Congress has created. *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 370 (1978); see *Snyder* v. *Harris*, 394 U.S. 332, 337 (1969); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10 (1941). Instead, the procedural rules adopted by this Court "merely prescribe the method by which the jurisdiction granted the courts by Congress is to be exercised."

Wright, Miller & Marcus, *Federal Practice & Procedure* § 3141, at 485 (1997).

As pertinent to this case, Congress has specified that an "objection[] to discharge" is a "core proceeding" within the jurisdiction of the bankruptcy court. 28 U.S.C. 157(b)(2)(J). Moreover, Rule 9030 specifies that the bankruptcy rules of practice "shall not be construed to extend or limit the jurisdiction of the courts or the venue of any matters therein." Fed. R. Bankr. P. 9030.[6] Accordingly, nothing in Rule 4004—including the time limit for the filing of objections to discharge set forth in that rule—"limit[s] the jurisdiction of the courts" over such objections. Fed. R. Bankr. P. 9030.

In order for a time limit for filing a claim to constitute a true "jurisdictional prerequisite to suit in federal court" (*Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. at 393), it would need to be established by Congress, not in a rule of practice or procedure adopted by this Court.[7] In this case, however, the statute that creates

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[6] Rule 82 of the Federal Rules of Civil Procedure similarly states that the rules of civil procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." Fed. R. Civ. P. 82.

[7] In rejecting the assertion that a time requirement in a rule of practice is "jurisdictional and cannot be waived," the Court stated in *Schact* v. *United States*, 398 U.S. 58, 64 (1970), that "it must be remembered that this rule was not enacted by Congress but was promulgated by this Court under authority of Congress to prescribe rules * * * . The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." Justice Harlan similarly emphasized in his concurring opinion in *Schact* that "this Court on occasion waives the time limitations imposed by its own

jurisdiction over "objection[s] to discharge" in bankruptcy cases contains no time limit for filing such claims. 28 U.S.C. 157(b)(2)(J). While this jurisdictional statute requires that some motions or proceedings in bankruptcy cases must be brought in a "timely" manner, the statute contains no such requirement for objections to discharge.[8] Because, as it applies to

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Rules and yet treats time requirements imposed by statute as jurisdictional." *Id.* at 68.

To be sure, a rule may, by its express terms or structure, require absolute compliance with a time limit and thus preclude reliance on equitable doctrines or waiver. For example, the time period for filing a notice of appeal may be strictly enforced even when it is fixed by rule, rather than statute. See, *e.g.*, Fed. R. App. P. 4(b)(1)(A) (10-day limit for appeal by a criminal defendant). While courts sometimes refer to such provisions as "jurisdictional" in an effort to describe the strict nature of the timeliness requirements, they are not true limits on jurisdiction. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) ("Jurisdiction, it has been observed, 'is a word of many, too many, meanings.' "); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. at 395 (the deadline for filing EEOC complaints is subject to equitable estoppel even though "our cases contain scattered references to the timely-filing requirement as jurisdictional").

[8] As the court of appeals emphasized (Pet. App. 12):

> Matters of timeliness are, notably, present in other provisions. For instance, section 157(b)(3) states that "[t]he bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceedings is a core proceeding." 28 U.S.C. § 157(b)(3). Further, for a party to obtain de novo review in the district court of a bankruptcy court's findings of fact and conclusions of law in a non-core proceeding, that party must "timely and specifically object[]." 28 U.S.C. § 157(c)(1). These references to timeliness in sections other than the grants of jurisdiction support the view that timeliness is not a prerequisite to the bankruptcy court's exercise of jurisdiction in a core proceeding such as [petitioner's] objection to discharge.

objections to discharge, this statute "does not limit jurisdiction to those cases in which there has been a timely filing," compliance with the time limitations of Rule 4004 is not a "jurisdictional prerequisite." *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. at 393.

The time limit for filing objections to discharge is set forth in a procedural rule adopted by this Court that has no jurisdictional effect and does not preclude application of principles of waiver or forfeiture. The bankruptcy rules, including Rule 4004(a), are designed to assist the bankruptcy courts in the management of cases and to promote the "'expeditious and economical administration' of cases under the Code." Fed. R. Bankr. P. 1001 advisory committee's note. These rules are to "be construed to secure the just, speedy, and inexpensive determination of every case and proceeding;" they are not to be construed to extend or limit the court's jurisdiction. Fed. R. Bankr. P. 1001, 9030.

The relevant jurisdictional provision in this case has no time limit for objections to discharge. It thus stands in stark contrast to jurisdictional provisions, such as the Federal Tort Claims Act, which commands that failure to comply with a filing requirement means that "an action shall not be instituted" and that "a tort claim against the United States shall be forever barred * * *." 28 U.S.C. 2675(a), 2401(b). Similarly, 28 U.S.C. 2107 specifies that, "[e]xcept as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." The Court has therefore noted that "the filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the

district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

Unlike a timely notice of appeal, which is a prerequisite for the jurisdiction of the court of appeals, the filing of a timely objection to discharge neither confers nor deprives the bankruptcy courts of jurisdiction over a creditor's discharge. That jurisdiction is established by statute (28 U.S.C. 157(b)(2)(J)), and the bankruptcy rules merely "govern procedure in [such] cases." Fed. R. Bank. P. 1001.

2. This Court's recent decision in *Young* v. *United States*, 535 U.S. 43 (2002), supports the conclusion that the time deadline in Rule 4004(a) is not jurisdictional. In *Young*, the Court addressed the three-year lookback period in Section 507(a)(8)(A)(i) of the Bankruptcy Code, which allows the government to collect taxes "for which a return was due within three years before the filing of an individual debtor's petition." *Id.* at 44. The Court held in *Young* that the period established in this limitations provision is subject to equitable tolling. *Id.* at 47. The Court stated that this statute "prescribes a period within which certain rights (namely, priority and nondischargeability in bankruptcy) may be enforced" and rejected the argument that the statutory lookback period was a "substantive component" of the Code. *Id.* at 47, 48. Instead, the Court found it to be a limitation provision that "serves the 'same basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* at 47. The Court emphasized that, while the purpose of the period is to "encourage[ ] the IRS to protect its rights" before the three-year period has elapsed (*id.* at 47-48), "nothing in the Bankruptcy Code precludes

equitable tolling of the lookback period." *Id.* at 47. Instead, the Court concluded that such limitations periods in bankruptcy cases are presumptively subject to equitable tolling because bankruptcy courts "are courts of equity and apply the principles and rules of equity jurisprudence." *Id.* at 50 (citations and internal quotation omitted).

Those same principles apply here. See *In re Phillips*, 288 B.R. 585, 592-593 (Bankr. M.D. Ga. 2002) (applying *Young* to Rule 4007). The deadline in Rule 4004(a) serves the same purposes furthered by all limitations periods—finality, repose, and certainty about liability. As *Young* makes clear, these basic purposes are not jeopardized by recognizing the applicability of equitable defenses in particular cases.

B. The Time Limit For Filing Objections to Discharge In Rule 4004(a) Of The Bankruptcy Rules Of Practice And Procedure May Be Forfeited By The Debtor

1. Because the timely filing requirements of the bankruptcy rules do not constitute "a jurisdictional prerequisite to suit in federal court," they are to be treated "like a statute of limitations" and are therefore presumptively "subject to waiver, estoppel and equitable tolling." *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. at 393. The fact that the time limit in Rule 4004(a) is presumptively "subject to" the doctrine of waiver—and to defenses such as equitable tolling or estoppel—does not, of course, mean that these defenses would always be available under Rule 4004(a) or that a failure to point out that an objection to discharge is untimely will always prove fatal. In the present case, however, petitioner does not claim that appropriate factual grounds for a finding of waiver are not present. See Pet. App. 18, 31, 33. Instead, petitioner incorrectly

urges only that the timely filing requirement of Rule 4004(a) is "jurisdictional" and therefore may never be waived. That contention is incorrect for the reasons already described.

Moreover, much of petitioner's argument is actually directed to an issue that is not presented in this case. Petitioner insistently maintains that, taken together, the structure of Rule 4004(a) (which establishes the time for objecting to discharge) and of Rule 9006(b)(3) (which provides that the time for such objections may be enlarged only when timely application for an extension is made pursuant to Rule 4004(a)) require the conclusion that "a court has no authority to *extend the deadlines* based on equitable exceptions imported from outside the rules." Pet. Br. 13 (emphasis added); see also *id.* at 28 (arguing courts have no equitable authority "to extend the time for objecting to discharge"). This case, however, does not involve the issue of equitable tolling, for it does not involve a timely objection to an untimely application to "extend the deadlines" for filing an objection to discharge under Rule 4004(a). Instead, it involves the distinct issue of whether petitioner *waived his right to object* to an objection to discharge that was admittedly untimely. The question whether, under these Rules, equitable tolling doctrines would permit a court to "extend" the deadline is thus not presented here. And, because that question is not presented here, the Court need not address whether the time restrictions in these Rules are in such "emphatic form" that they negate the "presumption" that equitable tolling is available to remedy "unfairness in individual cases" by extending the filing deadline. *United States* v. *Brockamp*, 519 U.S. 347, 350, 353 (1997).

2. The filing deadline in Rule 4004(a) is designed to further the prompt administration of bankruptcy estates and to allow the debtor to enjoy finality and certainty in relief from financial distress. Those purposes do not preclude application of the doctrine of waiver in this case. As petitioner acknowledges, the doctrine of waiver is designed to "promote finality" and efficiency in the adjudicative process (Pet. Br. 21). "[T]he debtor, if he or she asserts his or her rights in a timely manner, will not suffer any impairment of his or her interest in certainty, finality and prompt administration." *In re Santos*, 112 B.R. 1001, 1008 (B.A.P. 9th Cir. 1990).

Indeed, this case presents a core example of a waiver of rights in litigation, for petitioner failed to challenge the timeliness of respondent's objection to discharge until *after* the court had ruled on the merits of that objection. See page 6, *supra*. Recognizing that the bankruptcy rules are to be interpreted and applied to achieve "the just, speedy, and inexpensive determination of every case and proceeding" (Fed. R. Bank. P. 1001), the court of appeals properly concluded that the doctrine of waiver applies in this case.

C. The Decision Below Is Not Inconsistent With *Taylor* v. *Freeland & Kronz*

Petitioner mistakenly argues (Pet. Br. 19-21) that the decision in this case is inconsistent with the decision of this Court in *Taylor* v. *Freeland & Kronz*, 503 U.S. 638 (1992).[9] In *Taylor*, the Court held that the time limits

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[9] Petitioner also erroneously relies (Pet. Br. 21) on *Carlisle* v. *United States*, 517 U.S. 416 (1996), which concerned the proper application of Rule 29(c) of the Federal Rules of Criminal Procedure. The Court held in *Carlisle* that Rule 29(c) is "plain and unambiguous" and does not permit untimely motions for acquittal,

in Rule 4003 for filing objections to a debtor's list of exempt property apply even for exemptions that are not claimed in "good faith." *Id.* at 644-645. Under the Bankruptcy Code, a debtor may claim certain property as exempt from his bankruptcy estate. 11 U.S.C. 522(b). To do so, "[t]he debtor shall file a list of property the debtor claims as exempt. * * * Unless a party in interest objects, the property claimed as exempt on such list is exempt." 11 U.S.C. 522(*l*). Bankruptcy Rule 4003(b) specifies that the trustee or any "creditor may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors." Fed. R. Bankr. P. 4003(b).

The debtor in *Taylor* had listed as exempt property the proceeds from her pending employment discrimination suit. Even though only a portion of these proceeds would have been allowable as an exemption, the trustee decided not to object to the claimed exemption because he thought the debtor's claim "might be a 'nullity.'" 503 U.S. at 641. In a settlement of the discrimination suit that followed a verdict in favor of the debtor, the debtor received $110,000. The trustee thereafter filed a complaint to obtain a turnover of the funds to the estate. *Ibid.*

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even when the failure to make a timely filing is assertedly the result of "excusable neglect." 517 U.S. at 421. Indeed, the Rules involved in that case specified that "excusable neglect" is not a valid basis for a failure to comply with the time limits in Rule 29(c). *Id.* at 421. Moreover, in *Carlisle*, the government timely argued that the defendant's motion for acquittal "should be denied as untimely" (*id.* at 418), and the Court therefore had no occasion to address or consider whether the government could waive its right to challenge an untimely filing under Rule 29(c). The decision in *Carlisle* thus has no application to the present case.

The Court framed the issue in *Taylor* as "whether the trustee may contest the validity of an exemption after the 30-day period if the debtor had no colorable basis for claiming the exemption." 503 U.S. at 639. The Court held that the trustee "could have made a valid objection under § 522(*l*) and Rule 4003 if he had acted promptly * * * [but] that his failure to do so prevents him from challenging the validity of the exemption now." 503 U.S. at 642. The Court noted that Rule 4003(b) expressly gives the trustee and creditors 30 days from the initial creditors' meeting to object and that, "[b]y negative implication, the Rule indicates that creditors may not object after 30 days 'unless, within such period, further time is granted by the court.'" 503 U.S. at 643. The Court concluded that there was no statutory basis for limiting this 30-day requirement to exemptions that the debtor claimed in good faith under Section 522(*l*). 503 U.S. at 644-645.

The decision in *Taylor* does not describe the filing deadline contained in Rule 4003(b) as jurisdictional. Nor, as the court of appeals noted in this case, did the Court hold that the debtor had an unlimited time in which to object to an untimely objection by the trustee. Pet. App. 15 n.4. Indeed, the question whether the 30-day limitation period in Rule 4003(b) was subject to waiver or equitable tolling was simply not raised or presented in the petition in that case.[10] The Court in

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[10] As Justice Stevens noted in his dissenting opinion in *Taylor*, the Court did not address in that case whether "the doctrine of equitable tolling applies to the 30-day limitations period in Federal Rule of Bankruptcy Procedure 4003(b)." 503 U.S. at 646. Justice Stevens suggested that, if the Court had reached that question, it would have found "ample authority" for such a holding. *Ibid.* The Court, however, expressly declined to consider arguments in *Taylor* that were not raised below and that were not contained in

Taylor thus neither addressed nor unsettled the established rule that filing deadlines in procedural rules—like statutes of limitation generally—are presumptively "subject to waiver, estoppel and equitable tolling." *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. at 393.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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"the questions set forth in the petition" for writ of certiorari in that case. 503 U.S. at 645 (quoting Sup. Ct. R. 14.1(a)).

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